

RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
RETIREMENT AND EMPLOYEE BENEFITS
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
FIRST AND SECOND SESSIONS

ON

H.R. 1281 and Related Bills

TO PROTECT THE CIVILIAN EMPLOYEES OF THE EXECUTIVE
BRANCH OF THE UNITED STATES GOVERNMENT IN THE EN-
JOYMENT OF THEIR CONSTITUTIONAL RIGHTS AND TO
PREVENT UNWARRANTED GOVERNMENTAL INVASIONS OF
THEIR PRIVACY

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RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

MONDAY, MAY 14, 1973

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 10 a.m., in room 210, Cannon House Office Building (Hon. Jerome R. Waldie) chairman of the subcommittee, presiding.

Mr. WALDIE. The subcommittee will come to order.

Today we hold the first in a series of hearings into the right to privacy of Federal employees.

Although this is the first time that this particular subcommittee has engaged in such an inquiry, much has already been written and said on the subject by other congressional bodies. Legislation regarding this subject is pending before this subcommittee.

Before we take up that legislation, however, we hope to explore the threat of invasion of privacy to Federal employees, and to determine whether safeguards to protect Federal employees from such abuses are adequate.

I have only two preconceived notions, personally, concerning this subject:

First, when signing a contract, Federal employees sell only their services to the government—not their constitutional guarantees.

Second, in this age of technological advances, it is absolutely essential that the Congress continuously review and monitor any program which contains potential for the invasion of privacy to individuals in our society.

Our jurisdiction is over the millions of Federal employees in this Nation; our goal is to see that the Federal Government's policy in regard to privacy of its employees is a model for the rest of the country's employees.

To talk about official invasions of privacy today is to talk about nothing more nor less than the American form of constitutional government, and the limitations of governmental power over the citizen.

Because of this—and particularly in view of recent events—I believe that the Congress, State legislatures, and municipal bodies have a special responsibility toward their employees.

We hope to make a contribution in these hearings to furthering the concept that if our society is to remain truly free, it must root out the exercise of any governmental power which can infringe upon the constitutional rights of individuals.

(1)

Though we will be dealing mostly with the executive branch's abuses of power, we will also be inquiring, during the course of these hearings, into the subject of any legislation that has the abuse potential, abuse of power that exists in the legislative branch, regarding internal security files being made available to the executive branch in terms of employment opportunities, and we will be seeking to learn the extent of reliableness on those files by the executive branch and what those files contain.

The other member of the subcommittee that is with me is Mr. Hillis from Indiana. Do you have any comments, Mr. Hillis?

Mr. HILLIS. Not at this time, Mr. Chairman.

Mr. WALDIE. We will proceed with our first witness, Dr. Alan F. Westin, professor of public law and government, Columbia University, and author of the book "Privacy and Freedom."

You may proceed as you desire, Dr. Westin. I presume you would wish to have your statement included in its entirety in the record.

Dr. WESTIN. Yes, Mr. Chairman, if I may.

Mr. WALDIE. Without objection it will be included in the record.

[The prepared statement follows:]

PREPARED STATEMENT OF ALAN F. WESTIN, PROFESSOR OF PUBLIC LAW AND GOVERNMENT, COLUMBIA UNIVERSITY, NEW YORK CITY, N.Y.

Chairman Waldie, members of the subcommittee, and members of the subcommittee staff, I appear today, at the invitation of the chairman, to discuss three topics:

1. The general trend of computerization of personal records by government agencies and private organizations, the effects this is having on citizen rights to privacy and due process, and the role that Congress ought to play in the development of proper safeguards for civil liberties in such computerized files;

2. The implications of computerization on federal personnel records in particular, and safeguards for employee civil liberties that ought to be looked into by Congress; and

3. The re-introduction into the Senate and House of the Federal Employee Privacy Bill, whose principal author and sponsor has been Senator Sam Ervin.

Because of the lateness of the notice that I received inviting me to testify, I have not been able to prepare a full written statement. However, I have presented in this prepared statement a brief indication of the positions I want to present on each of the three points mentioned above, and I will discuss these as fully as the Subcommittee may desire in my oral remarks.

1. Computerization and civil liberties: The time for congressional activity and action is now

As the Chairman knows, I have recently completed a three year study of the impact of computerization on civil liberties, which I directed for the Computer Science and Engineering Board of the National Academy of Sciences. The major findings and recommendations of our project are summarized in a synopsis of our report that I am appending to my testimony. I will be glad to discuss any of these conclusions further in response to questions.

Our report stresses that the time is here for Congress to develop a far more activist and interventionist role in the oversight of computerization and the definition of civil liberties guarantees in large-scale record systems than Congress has seen fit to do in the past. Specifically, we recommended that Congress pass a general right-of-access law to open the records kept on American citizens, including federal employees, to inspection and challenge by the individual; that Congress set rules of confidentiality for the handling of confidential information held by various interstate information-collecting organizations, such as credit-card companies, travel and entertainment firms (such as airlines), and credit-reporting agencies; that Congress look at several major areas and enact

legislation to see that certain kinds of information does not get recorded and/or disseminated in federal databanks at all (such as arrest-only records in the national law enforcement networks); that Congress reconsider the decision of the Nixon Administration giving the F.B.I. jurisdiction over the national summary criminal history index, and the placement of the uniform crime statistics function in the F.B.I.; that Congress reconsider the permissive policies presently used with regard to the Social Security number, and restrict the growing requirement imposed by government agencies and private organizations that individuals must obtain and furnish Social Security numbers; and that Congress enact a basic employee-right-to-privacy act as a means of setting the federal government's own house in order, as an example to state and local governments, and to private employers.

Again, I will be glad to discuss any of these specific recommendations in greater detail. In my mind, they represent the broad actions that Congress ought to take if we are to get our legislation into shape so that the useful contributions of automatic data processing can be realized, without doing fundamental harm to the rights of privacy and due process of American citizens.

Beyond the recommendations discussed in our report, there are two others that I think represent major Congressional priorities.

(a) I believe that Congress should enact legislation providing that any executive agency that plans to install a computer system affecting personal records, or to make a major expansion in scope of an existing computer operation, should be required to conduct a public proceeding, after due notice, detailing its plans, specifying the impact of the system on pre-existing rights of privacy and confidentiality, and rights of access to the files, and setting forth the safeguards being developed for both civil liberties and security matters. Notice should be given that any persons or groups interested can file statements and appear at public hearings. The head of the agency should be required to prepare a response to the objections or problems raised at this pre-computerization hearing and file this with the committee of Congress having subject-matter jurisdiction over the agency involved. Alternatively, such a response statement might be filed with the House and Senate Government Operations Committee, for review. I believe that only when we have developed such review of computerization in public proceedings *before* plans are adopted and computer systems are built at enormous public expense will we be using the right *process* for developing protections for privacy and due process in the computer era. Incidentally, I would also require that the issue of improving public access to information in government files also be treated at such a hearing, since this is another vital aspect of constitutional government that will be adversely affected by executive-oriented computerization if we do not insure proper scrutiny of systems before they are installed.

(b) I believe Congress has another way to approach the creation of a continuing review of government computerization. This would be to include in the pending revision of the federal Freedom of Information Act a provision specifying that federal agencies are charged with the duty of using the techniques of automatic data processing in ways that give positive protection to rights of privacy, confidentiality, and due process in personal files, and that an annual statement of the measures being adopted to fulfill that duty must be filed with the Comptroller General. If that official did not believe that the measures being taken were adequate, he would report that conclusion to the House and Senate Government Operations Committees, for appropriate hearings and possible legislative action.

There are precedents for each of these proposals. On the first, the Federal Power Commission is currently conducting such a rule-making hearing on its plans to install a fully automated regulatory information system. (Docket R-438, "Development of Fully Automated Computer Regulatory Information System." Notice of a Proposed Rulemaking and Request for Comments, April 13, 1972). On the second, such a provision setting a duty to use ADP to supply information about certain regulated companies to consumer counsel and the Federal Government, with the Comptroller General function of review, is contained in S. 770, a pending bill by Senator Lee Metcalf to create the Inter-governmental Office of Consumers' Counsel. (See *Cong. Record*, Feb. 6, 1973, pages S2112-2116.)

Both of these actions would, in my opinion, set the new ground rules for Congressional supervision and review of executive agency computer usage that I regard as important for giving timely protection to citizen rights.

II. Implications for Federal personnel record computerization

One of the major findings of the National Academy of Sciences study on computer impact was that computers carry over, and often accentuate by their efficiency, basic problems of civil liberties that are present in the pre-existing manual files. This seems to me the essential issue as far as the on-going computerization of personnel records by the United States Civil Service and in the particular personnel files maintained by individual federal agencies.

First is the issue of access by the employee to information in his own record. At present, I believe federal practice is improperly restrictive, refusing to allow employees to learn what derogatory information is in their files and whether this is being used to make assignment, promotion, and retention decisions about them, whenever a supervisor brands such information as investigative or security data. I accept the fact that there may be times when national security interests compel the shielding of some such information, but I believe the current practice goes far beyond what is required, with fundamental harm to employee due process rights. I will be glad to discuss this further, though I understand that the Subcommittee will be having testimony from employee unions and the American Civil Liberties Union on this point.

Second, I think it would be in the public interest for this Subcommittee to circulate a survey questionnaire to each federal agency, and to the U.S. Civil Service Commission, asking what information about employees is currently being collected and stored, what the rules of confidentiality and data-sharing are with respect to these records, what rights of access are provided to employees to each segment of the record, and how these rules have been applied in the computerized files that have been created in the personnel area of that agency. Compiling such responses and analyzing them would be a major service, especially since it would bring out the good practices by way of safeguards and due process procedures in the best federal agencies, spotlight those agencies that may not be observing such practices, and help spur pressure for reforms. A good place to start would be to collect information and hear about the procedures being developed in seven major computerized manpower files being developed by the Civil Service Commission: the Civil Service Register of Eligibles; the Annuity File; the Commission's Internal Payroll File; the Central Personnel Data File; the Federal Automated Career System File; the Executive Assignment System File; and the 10% Federal Personnel Statistics Sample File. Again, I will be glad to answer questions about any of these files, and the procedures under them, to help the Subcommittee consider the basic issues involved.

III. The Ervin Federal employees privacy bill

I testified in support of this bill in 1967, and I support it today. If anything, I think its provisions have improved with the perspective that the passage of time allows, in the tradition of good wine mellowing in the cask. It deserves passage, if not in its exact present form, then with the kind of perfecting amendments that would accumulate the necessary votes in the House to pass it there, and, if necessary, to support an overriding presidential veto.

I appreciate the opportunity to appear before the Subcommittee. Your inquiry is most timely, important, and welcome. In the Watergate era, privacy needs all the institution help it can get.

(Appendix to testimony of Alan F. Westin)

DATABANKS IN A FREE SOCIETY: A SUMMARY OF THE PROJECT ON COMPUTER DATABANKS

The United States has become a records-oriented society.

In each major zone of personal and civil life (education, employment, credit, taxation, health, welfare, licensing, law enforcement, etc.), formal, cumulative records are assembled about each of us by hundreds of private and government record-keeping organizations. These personal histories are relied on heavily by the collecting organizations in making many decisions about our rights, benefits,

and opportunities. Informal networks for sharing record-information among public and private organizations have become a common feature of organizational life heavily dependent on credentials.

During the past two decades, as most government agencies and private organizations have been computerizing their large-scale files, the American public has become concerned that dangerous changes might be taking place in this record-keeping process. Because of the computer's enormous capacities to record, store, process, and distribute data, at great speeds and in enormous volumes, many people have feared that far more personal data might be assembled about the individual than it had been feasible to collect before; that much greater sharing of confidential information might take place among the holders of computerized records; and that there might be a lessening of the individual's ability to know what records have been created about him, and to challenge their accuracy or completeness.

The book *Databanks in a Free Society* (currently being published by Quadrangle Books, a *New York Times* subsidiary) is the report of the first nationwide factual study of what the use of computers is *actually* doing to record-keeping processes in the United States, and what the growth of large-scale databanks, both manual and computerized, implies for the citizen's constitutional rights to privacy and due process. This article is a summary of the book. The book also outlines the kinds of public policy issues about the use of databanks in the 1970's that must be resolved if a proper balance between the individual's civil liberties and society's needs for information, is to be achieved.

HOW THE STUDY WAS CONDUCTED

The book is the report of the "Project on Computer Data Banks," a three-year research study conducted under the auspices of the Computer Science and Engineering Board of the National Academy of Sciences, under grants of \$164,000 from the Russell Sage Foundation. The Director of the Project was Dr. Alen F. Westin, Professor of Public Law and Government, Columbia University, and author of *Privacy and Freedom*, published in 1967. An interdisciplinary staff of seven scholars from the fields of law, computer science, and the social science collaborated in the research. The project received continuing guidance not only from the Computer Science and Engineering Board but also a special Advisory Board of 18 prominent figures in public life whose views spanned the full spectrum of opinion on issues of databanks and civil liberties. The final report of the project was written by Dr. Westin and Mr. Michael A. Baker, Assistant Director of the Project and an Instructor in Sociology at Brooklyn College of the City University of New York.

SOURCES

The major sources collected and used by the Project include:

1. Documentary materials on computerized record systems in more than 500 government agencies and private organizations.
2. Detailed on-site staff visits to 55 of the most advanced computerizing organizations, ranging across the most sensitive fields of personal record-keeping.
3. Replies from over 1500 organizations in a national mail survey of developments in computerization and record-keeping among government agencies and private organizations.
4. Extensive interviews with officials from computer companies, software houses, systems consulting firms, industry associations, civil liberties groups, labor unions, consumer organizations, minority-rights organizations, and professional associations.
5. Legal, legislative and regulatory-agency materials dealing with databank issues in 25 distinct major fields of personal record-keeping.
6. Materials and interviews on the state of data-bank developments and regulatory controls in 23 foreign nations, for purposes of comparison with the United States.

ORGANIZATION OF THE REPORT

The Report is organized into five parts:

Part I presents a brief, orienting discussion of computer systems and civil liberties concepts for general readers.

Part II consists of "profiles" of 14 governmental, commercial, and private organizations, drawn from the 55 to which the Project staff made on-site visits. Each profile describes the nature and function of the organization, its pre-computer record-keeping, its move into computer usage, the effect of automation on its record-keeping about people, previous civil liberties issues involving the organization's manual record-keeping, the effect of computerization on civil liberties protections, and the organization's plans for further computerization in the next five years.

The 14 organizations given this detailed treatment are:

The U.S. Social Security Administration
 The F.B.I.'s National Crime Information Center
 Kansas City (Missouri) Police Department
 New York State Department of Motor Vehicles
 City of New Haven, Connecticut
 Santa Clara County, California
 Bank of America
 TRW—Credit Data Corporation
 Mutual of Omaha Insurance Company
 R. L. Polk & Company
 Massachusetts Institute of Technology
 Church of Latter Day Saints
 Office of Research, American Council on Education
 Kaiser-Permanente Health Plan

Part III has three chapters which present and analyze the Project's principal findings. These include an overview of what kinds of files have and have not been computerized in advanced organizations; an analysis of computer effects on civil liberties that are *not* taking place as yet; and a description of those changes in record-keeping that the use of computers and communication systems is producing in these organizations.

Part IV is an analysis of the way in which the reception of computer technology is affected by organizational, legal, and socio-political factors, followed by a forecast of developments in new computer and communications technologies that are likely to occur in the remainder of the 1970's, and an analysis of their implications for civil liberties interests.

Part V discusses public policy choices in the 1970's in light of the project's findings and forecasts. The first chapter analyzes the larger socio-political significance of the computer's arrival in the late 1950's and 1960's; it goes on to suggest the basic civil liberties principles that ought to be followed when seeking to safeguard citizen rights in large-scale record systems, especially in the increasingly computerized sectors of American organizational life. The final chapter of the report presents an agenda for the 1970's, identifying six areas of priority for public policy and civic action.

Three appendixes to the report present: the results from the Project's survey of organizations; an analysis of public opinion literature on privacy and the computer; and information about the experience of other advanced industrial nations in dealing with the databanks-and-privacy problem.

HIGHLIGHTS OF THE REPORT

A great many commentators have warned that the spread of computers is fundamentally altering the balance between information policies of organizations and individual rights to privacy that marked past eras of record-keeping. Compared to what was done in the manual era, it is said, the new capacities of the computer *inevitably* lead organizations to collect more detailed and intrusive personal information about individuals; to consolidate confidential information from previously separate files; and to share confidential personal data with government agencies and private organizations that had not received it before.

The Project's findings from visits to 55 organizations with highly advanced computer applications is that computerization is *not* yet having such effects in the overwhelming majority of such organizations. For a combination of technological and organizational reasons, central databank developments are far from being as advanced as many public commentaries have assumed. Organizations have so far failed to achieve the "total" consolidation of their informa-

tion about individuals which raised civil liberties alarms when such goals were announced in the 1960's by various government agencies or private organizations.

CONTINUANCE OF POLICIES

Further, in computerizing their records on individuals, organizations have generally carried over the same policies on data collection and sharing that law and administrative traditions in each field had set in the pre-computer era. Where new law or practices have evolved to protect individual liberties over the past decade, organizations with computerized systems have followed such new policies as fully as those that still use manual files and procedures. Even the most highly computerized organizations continue to rely heavily on manual record-keeping and retain in their paper files the most sensitive personal information they possess.

Another widely held fear is that computerization makes it more difficult for the individual to know what is in the file about him, to have errors corrected, or have the data erased where public policy specifies that certain information about an individual's past should be ignored.

The Project's inspection of advanced systems showed that notice to the individual about a record's existence, opportunity to inspect and challenge that record, and policies as to the removal of out-of-date or irrelevant information were not being substantially altered by computerization. Where policies affording individuals rights of due process such as the above had been provided in an organization prior to computerization, those rules are being followed in the new computerized systems as well. Where no such rights were given, the adoption of computers has not made the situation either worse or better. Neither has computerization introduced impersonal decision-making in systems where this was not present before, nor forced organizations into greater reliance on "the record" in making decisions about clients, customers or citizens. Where abuses along these lines were present in computerized systems—raising serious due process questions—they had been carried over from the high-volume "processing" of people in the manual era.

PUBLIC MISUNDERSTANDING

Over and over again, the Project's findings indicate profound public misunderstanding about the effect of computers on large scale record systems. To some extent, the inflated claims and proposals of organizational managers about the capacities of their computer systems helped to generate what were in fact baseless concerns for privacy on the part of the public.

In addition, as the Report shows with respect to law enforcement uses and airline-reservations and charge-card systems, many commentators on computers and privacy issues have failed to do adequate research into the actual operations of systems about which they write, and have presented entirely incorrect pictures to the press and public about how these computer systems work. The danger in this, the report points out, is that we may give up the fight in the belief we have already lost:

"If we assume that computer users are already doing things that they are not, we risk surrendering without a fight the border between properly limited and surveillance-oriented computer applications. . . . The question of what border control measures should be adopted can hardly be understood and properly considered . . . if the public and opinion leaders assume that the borders have already been obliterated."

EFFICIENCY

Computerization in advanced organizations *is* producing changes in record-keeping methods that can increase the efficiency with which organizations carry out their basic decision-making about the people they process or serve. Computerization is making it possible for many organizations to: maintain more up-to-date and complete records; obtain faster responses to inquiries about a given individual; and make more extensive use of information already in the files. Computers have also made possible dramatic expansion of networks for exchange of data among organizations that have shared data since precomputer days; and the creation of some large data bases of information about people that would not have been feasible without automation. These changes have

been felt already in police information systems, national credit reporting systems, charge card systems, and others.

DATA-SHARING

Looking at technological trends for the remaining years of the 1970's, the Report forecasts that while there will be important continued increases in computer capabilities, no developments are now foreseeable that will alter the technological, organizational, and socio-political considerations that presently frame the databanks and civil liberties issue. Organizations will have more flexible, reliable, and cost-effective computer systems to use in pursuit of their policies, but these will not represent a radical departure from the computer capabilities presently available. The most important development with implications for civil liberties interests will be an increase in the ease with which data can be shared among organizations which have computers, coupled with a reduction in the cost of doing so. This will make it imperative that legal boundaries as to data-sharing are set as clearly as possible.

AUGMENTING THE POWER OF ORGANIZATIONS

The Project concluded that the real issue of databanks and civil liberty facing the nation today is not that revolutionary new capacities for data surveillance have come into being as a result of computerization. The real issue is that computers arrived to augment the power of organizations just when the United States entered a period of fundamental debate over social policies and organizational practices, and when the traditional authority of government institutions and private organizations has become the object of wide-spread dissent.

CHALLENGE OF GOALS

Important segments of the population have challenged the goals of major organizations that use personal records to control the rights, benefits, and opportunities of Americans. There is also debate over the criteria that are used to make such judgments (religious, racial, political, cultural, sexual, educational, etc.), and over the procedures by which the decisions are reached, especially those that involve secret proceedings and prevent individuals from having access to their own records.

DISTRUST OF ORGANIZATIONAL RECORD-KEEPING

Computers are making the record-keeping of many organizations more efficient precisely at the moment when trust in many large organizations is low and when major segments of the American population are calling for changes in values that underly various social programs, for new definitions of personal rights, and for organizational authorities to make their decision-making procedures more open to public scrutiny and to the review of specific individuals involved.

LITTLE LEGISLATION

Despite the rapid spread of computers, there has been little so far by way of new legislation, judicial rulings, regulatory-agency rules, or other legal remedies defining new rights to privacy and due process in major record systems. The Report stresses that, because of the increased efficiency of recordkeeping and the growing intensity of the public's concern, the middle 1970's is the moment when lawmakers and the public must confront both long-standing and newly-raised civil liberties issues, and evolve a new structure of law and policy to apply principles of privacy and due process to large-scale record-keeping.

The Report identifies six areas of priority for public action, and presents examples of specific policy measures under each of these that ought to be seriously considered by policy makers:

RIGHT OF ACCESS AND CHALLENGE

Development of lawsto give the individual a right of access and challenge to almost every file in which records about him are kept by city, county, state, or government agencies: At stake here is the possibility that, denied access to

records being used for decisions about himself, the citizen is left with "feelings of powerlessness and the conviction that government authority is fundamentally arbitrary."

At the very least, citizens ought to know what record systems exist in government agencies. A Citizen's Guide to Files, published at every appropriate level of government jurisdiction, should "provide the citizen with a thorough, detailed and non-technical directory of the record systems that contain information about him, and the general rules under which it is being held and used." Providing adequate due process protection in government files, the Report suggests, is best achieved by assuming that any individual should be able to see and get a copy of any records used to affect him or her personally—with the record-keeping agency "bearing the burden of proving that some specific public interest justifies denying access."

EXPLICIT RULES

Development of explicit laws or rules balancing confidentiality and data-sharing in many sensitive record systems that today do not have clearly defined rules: Among these would be rules governing the provision of information to law enforcement agencies from bank accounts, travel and entertainment card records, airline and hotel reservation systems, etc. The Report predicts that one or two large systems will come to dominate in each of these areas.

"This development will make the individual's account record more comprehensive and a very inviting target for investigators of all kinds. With that rise in sensitivity and attractiveness ought to go legislative enactments spelling out retention and destruction policies, confidentiality rules, and procedures for protecting individual rights when outsiders seek to obtain access for what are asserted to be lawful and necessary purposes."

As a case study in how not to build new record systems, the Report discusses some of the major Administration and Congressional proposals for national welfare reform, which generally hinge on the availability of computers for massive data storage and exchange. Several of the welfare system proposals contain "sweeping authorizations for data collection and sharing but almost nothing by way of confidentiality standards and due-process review procedures." The Report points out that we may be "creating one of the largest, most sensitive, and highly computerized record systems in the nation's history, without explicit protections for the civil liberties of millions of persons whose lives will be profoundly affected . . ."

RECORDS OF THE WRONG KIND

Limit the collection of personal information where a proper regard for the citizen's right to privacy suggests that records ought not to be maintained at all by certain organizations, or never furnished for certain uses in the society: Among the examples are the use of arrest-only records in licensing and employment decisions, and the selling to commercial advertising services of names and addresses collected by government under its licensing and regulatory powers, unless the individual specifically consents to such use.

In the case of arrest records, the Report stresses that:

"A democratic society should not allow arrest records to be collected and circulated nationwide with increasing efficiency without considering directly the actual social impact of their use in the employment and licensing spheres, and without examining the possibility that dissemination beyond law-enforcement agencies represents an official stigmatization of the citizen that ought to be either forbidden by law, or closely regulated."

SOCIAL POLICY

Increased work by the computer industry and professionals within it on technological safeguards which will make it possible to implement confidentiality policies more effectively than is now feasible: The Report notes that:

"No 'technological fix' can be applied to the databank problem. Protection of privacy is a matter of social policy, on which computer professionals are fellow-citizens, not experts."

But the Project calls for more research, development and testing efforts to be undertaken by the computer industry to see that the computer's capacities

for protection of confidentiality and insurance of proper citizen access are turned into "available and workable products." Law and public pressure, the Report suggests, require that such measures be taken by managers of sensitive record systems when they are computerized, thereby stimulating the "user demand" to provide a practical market for such devices and techniques.

NO EXTENSION OF USE OF SOCIAL SECURITY NUMBER

Reconsideration by Congress and the executive branch of the current permissive policies toward use of the social security number in an increasing number of government and private record systems: The Report notes that having such a number is not a prerequisite for linking files within or between organizations, but notes that a common numbering system clearly makes record linkage easier and cheaper. Further, the Project concludes that resolving the critical civil liberties issues in record keeping "will require that a minimum level of trust be maintained between American citizens and their government. Under these conditions, adopting the social security number as a national identifier or letting its use spread unchecked cannot help but contribute to public distrust of government."

INFORMATION-TRUST AGENCIES

Experimentation with special information-trust agencies to hold particularly sensitive bodies of personal data: For example, the Report suggests that the handling of both national crime statistics and summary criminal histories ("rap sheets") might be taken away from the Federal Bureau of Investigation and placed in an independent national agency under control of a board that would have public representatives as well as law enforcement officials on it. Such an agency would have to be established "with a clear legislative mandate to be a 'guardian' institution," paying attention to civil liberties interests as well as law enforcement needs.

CRITICAL PERIOD, 1973-78

The Report stressed that the next five years would be a critical period in the reception and control of sensitive personal record systems, especially those managed by computers. More sensitive areas of record-keeping are being entered by many computerizing organizations; many larger on-line (instant access) networks are being brought into operations; and more consolidations of presently scattered records about individuals can be seen as a trend in certain areas, such as criminal justice, credit and financial transactions, and welfare. The Report stresses that unless lawmakers and organizational managers develop proper safeguards for privacy and due process, and create mechanisms for public scrutiny and review, the record systems they are building could sharpen the already serious debate in American society over the way to apportion rights, benefits, and opportunities in a credential-oriented society, and leave organizational uses of records to control individual futures too far outside the rule of law.

In its closing paragraphs, the Report sums up the databanks and civil liberties problem as follows:

"If our empirical findings showed anything, they indicate that man is still in charge of the machines. What is collected, for what purposes, with whom information is shared, and what opportunities individuals have to see and contest records are all matters of policy choice, not technological determination. Man cannot escape his social or moral responsibilities by murmuring feebly that 'the Machine made me do it.'"

"There is also a powerful tendency to romanticize the pre-computer era as a time of robust privacy, respect for individuality in organizations, and 'face-to-face' relations in decision-making. Such arcadian notions delude us. In every age, limiting the arbitrary use of power, applying broad principles of civil liberty to the troubles and challenges of that time, and using technology to advance the social well-being of the nation represent terribly hard questions of public policy, and always will. We do not help resolve our current dilemmas by thinking that earlier ages had magic answers.

"Computers are here to stay. So are large organizations and the need for data. So is the American commitment to civil liberty. Equally real are the **social cleavages and cultural reassessments** that mark our era. Our task is

to see that appropriate safeguards for the individual's rights to privacy, confidentiality, and due process are embedded in every major record system in the nation, particularly the computerizing systems that promise to be the setting for most important organizational uses of information affecting individuals in the coming decades."

STATEMENT OF ALAN MESTIN, PROFESSOR OF PUBLIC LAW AND GOVERNMENT, COLUMBIA UNIVERSITY, NEW YORK CITY, N.Y.

Dr. WESTIN. Mr. Chairman, members of the subcommittee, I have been asked to open the hearing on the broadest level of inquiry, to give an overview of issues of invasion of privacy, to show how automatic data processing and the movement from manual records in the Federal Government is accentuating problems of privacy, confidentiality, and due process involving information collected about and used to administer Government.

In particular, I was asked to bring to the attention of the subcommittee the principal findings of a 3-year study that I directed on behalf of the National Academy of Sciences into the impact of computerization on civil liberties. Appended to my statement is a summary of our report, "Databanks In A Free Society," which describes how our project was conducted. Briefly, we made on-site visits to 55 of the most advanced computerized organizations in the United States: Federal, State, and municipal agencies, and a wide variety of private organizations, including credit-card companies, insurance companies, educational institutions, and so forth. We examined systematically the computerization plans of 500 organizations most experienced with computerization. Finally, we did a large-scale mail survey that brought us responses describing record-keeping of personal information and computerization in 1,500 respondent organizations.

The single most important findings of our study was that computer data banks have not thus far transformed the rights of privacy and due process—the computer has not resulted in a sudden acquisition by organizations of vastly more information about individuals than they previously collected. Various kinds of organization impediments, technological problems, and legal constraints explain this fact. We also did not find that the computer was leading organizations to share information in radically different ways than they did previously. Nor did we find that the mere presence of computers was leading organizations to give less, or more, access to individuals to see the information that was in the files about them.

What our study concluded was that, while these kinds of deepest fears about the immediate impact on computers on recordkeeping were not being realized, the computer was exacerbating or intensifying some long delayed and increasing acute problems of civil liberties in large scale record systems.

In general, computers were having several major effects on organizational use of personal information. Records are more up-to-date and complete as a result of the computerization. There are faster inquiries and more swift action being taken on the basis of

records generated through computerization. The computer is leading to the creation of many regional and national networks of information sharing, usually built on the preexisting manual files, but tying together thousands of organizations in law enforcement networks, credit networks, travel and entertainment firms, etc. Through these kinds of repositories, computerized information is having more effect on the way people are judged, how their opportunities and benefits are determined in a society that relies on records with increasing frequency. We also found that the computer was leading to much more extensive use of information in the files than was the case previously, because the computer's capacity to manipulate information leads organizations to make greater use of information that they once collected but lacked the time or resources to use effectively in their activities.

Finally, we found that the computer was leading to the creation of some large-scale data systems that would have not been feasible to manage before the use of computers. That is not to say we did not have large record systems previously; we did. There were huge social security files, FBI files, files of the Civil Service Commission, and files of national credit and employment investigating firms. But certain kinds of national credit fast-response information systems and the proposed family assistance plan debated by Congress in 1969-72 simply could not be conceived without large-scale computer resources. It would also have been difficult to have installed medicare as quickly as it was done had it not been for the fact that the Social Security Administration is a wall-to-wall computer outfit, with a lot of experience in building records quickly.

Therefore, after separating the real from the fanciful effects of computers, our study concluded that the moment was ripe for legal actions to see that computers were an occasion for codifying and extending civil liberties interests, not ignoring them. Legislative bodies all over the country, and in particular, the Congress, should regard computerization of files as a trigger that sets off intensive and careful legislative scrutiny of the basic rules of privacy, confidentiality, and due process in that record system. It is not that the basic issues have been transformed, but that they must be paid attention to with greater care in light of computer power.

Our report therefore, recommends that Congress should consider passing a right-of-access law that would open the records that Federal agencies keep on American citizens to proper notice and challenge. With certain minimal exceptions where necessary in the interest of law enforcement investigation or national security, an individual should know what records are being kept about him or her by Federal agencies and have the right to inspect these to make sure the information is accurate and complete, and is not being used in ways that the record itself could show to be misleading and unfair. There should also be some kind of contest procedure, so that where an executive agency was relied on for information to the detriment of an individual whose Federal interests were being controlled by some executive action, there should be some kind of outside review mechanism, whether an independent board of review

or a court proceeding, so that the executive agency action could be tested for its reasonableness.

We also concluded that Congress has a major role to play in setting clearer confidentiality rules for sensitive record systems, especially systems that have not been the subject of this kind of careful legislation as yet. For example, travel and entertainment records, airline reservations, automobile rental agency files, files of credit-reporting services and credit card companies (BankAmericard, American Express, Diners Club), various files in banks—in this whole area of private recordkeeping which depends on interstate exchange of information, it is no longer appropriate to leave the decision as to who should have information solely to the discretion of the managers of these files. We need rules of confidentiality set by law and repudiation.

We did not find in our studies that American Airlines or American Express were great abusers of the information they collected. We did find a paucity of standards, leaving it to individual general counsel and each individual president of a company whether that organization will comply with requests by government investigators, income tax investigators, credit bureaus, personnel investigators, et cetera.

We also believe that Congress might look at a number of major areas in order to decide what information should be kept by Federal organizations at all. We treated two examples in our book, the use and dissemination of arrest-only records and a second, which I know is going to be the subject of much more extensive testimony by other witnesses, the right of privacy of Federal employees, in terms of what information should be collected dealing with the private lives activities and associations. In both cases it seems to us it will take Congressional legislation to determine what information, from the standpoint of privacy, should be collected and stored at all in these record systems.

You will notice that in my examples I started with due process, giving people the right of access to files. That seems to be critical because with that comes visibility as to the Federal practice. With visibility the public can judge what is appropriate and what is not appropriate. If information is collected for a proper purpose, one still has to control its dissemination for other uses by other persons without the consent of the individual. That is the critical dimension of confidentiality. Finally, what ought to be collected at all and what should the Government not extract from individuals is the dimension of privacy.

In addition there were some other areas in which we thought our findings pointed to the need for legislative action. One instance is who should be charged with the keeping of sensitive information that is to be relied on by many agencies of the Government.

In 1917 the John Mitchell administration in the Department of Justice made a decision which I think was a wrong one. They gave to the FBI the management of national summary criminal history index. In doing so, they rejected two alternative proposals as to who should keep this sensitive, computerized index of information about arrest, conviction, incarceration, probation, and parole rec-

ords. They rejected the idea that it be given to an independent Federal agency managed by LEAA, and they also rejected the proposal that this be run as an interstate consortium, with one State acting as the switching system. That was a wrong decision because, in an age in which criminal history information files of this kind are increasingly sensitive, and where they have to be relied on not just by police, but by the court, prosecutors, and others which are part of the national criminal justice system, it seems inappropriate that it should be controlled by an investigative agency such as the FBI.

There is ample precedent for the idea that independent agencies are the ones to have these new data-base functions. For example, in New York State, Governor Rockefeller, in the early sixties, began to consider ways to use computer technology in law enforcement and criminal justice. The decision was made to create an independent State agency, the New York State Identification and Intelligence System, NYSIS, to be the custodian of all the summary criminal records to be used by each of the various communities in the New York State concerned with criminal justice—the police, prosecutors, courts probation, prison, and parole agencies. NYSIS has no line or prosecutive function. It is an information-trust agency. Since its creation in the mid-sixties, it has shown an exemplary pattern in resisting political pressures and pioneering security and privacy concepts for automated criminal justice information agencies throughout the country.

Congress would be doing the FBI a disservice if it allows the Mitchell decision to stand, and the FBI to continue to maintain such an influential source of control over the information base of national criminal justice.

Another area in which our report suggests that Congress ought to concern itself, is over the current permissive policy in the use of social security numbers. We made it clear in our report that having social security numbers in files is not a necessary prerequisite to their being merged and mixed together in databanks or multiframe computer systems. But it does make it easier and cheaper to merge files. Therefore, we concluded because fundamental laws protecting privacy and confidentiality and giving individuals access to their files, are not presently in place in those types of situations in which these protections are vitally needed, the Congress ought to re-examine the current policy of allowing social security numbers to be required in so many different settings of private organizations, local and State government, and throughout the Federal System.

We had in mind action that would hold the social security number to its original intended purpose, plus a few other carefully considered uses such as income tax forms. But, beyond that, Congress should consider giving the citizen a right to refuse to give his social security number as a requirement for obtaining benefits from governmental authorities, Federal, State, and local, or as a condition of receiving various kinds of services from private organizations.

For instance, in New York State, as a result of citizens protest, an executive ruling about a year ago provided that a citizen did not have to give his social security number in order to register his

motor vehicle and get a drivers license; it was made a voluntary matter.

I think this is the pattern we ought to follow, rather than insisting, for every single benefit we get in society, we must put a number on ourselves in ways that raise much greater likelihood of information mergers than would be the case without such a facilitating number.

Finally, our report suggested that the executive branch ought to put its own house in order, by enacting a Federal-Employees-Right-to-Privacy Act. While our report did not specifically advocate the exact terms of Senator Ervin's Right-to-Privacy Act, we looked at the basic provisions and felt it was the proper direction in which Congress ought to go.

These are major recommendations of the report. In preparing this testimony, however, I wish to go beyond our 1972 report and make some suggestions for other important initiatives that I believe Congress ought to be considering. Two of these seem to me extraordinarily high priorities.

First, I think we need basic legislation from Congress providing that whenever an executive agency plans to install a computer system affecting personal records, or to make some kind of major expansion in an already existing computer center, this should be the subject of a public proceeding with due notice to interested parties. The agency should detail the plans and specify the impact of the system on preexisting rights of confidentiality and privacy and access, and indicating what safeguards are being developed in the proposed computer system. With proper notice, persons and groups interested could file statements and appear at public hearings. The head of the agency should be required to prepare a response to the objections or problems that have been raised at this precomputerization hearing, and I would propose that this statement by the head of the executive agency be filed with the appropriate committee of Congress having subject-matter jurisdiction over the agency involved or, alternatively, if it were thought desirable to centralize these various reports in one agency, they could then get an overall idea of how the computerization could be developed. I could see the House and Senate Government Operations Committee as a very logical body for putting these reports to and having them reviewed.

Only when we have developed such a review of computerization, in proceedings that are open to the public, before plans are adopted and computer systems are built at enormous public expense, will we be using the right process for developing protections for privacy and due process in the computer era. There is good precedent for this idea. The Federal Power Commission is currently conducting such a rulemaking hearing on its plans to install a fully automated regulatory information system. They issued a notice of a proposed rulemaking back in 1972 and asked all interested parties to comment on the adequacy of the plan. This ought to be something that should be made a requirement for all Federal agencies and departments.

The second major action that Congress ought to take, in my judgment, is to include in the pending revision of the Federal

Freedom of Information Act a provision specifying that Federal agencies are charged with the duty of using the techniques, of automatic data processing in ways that give positive protection to rights of privacy, confidentiality, and due process in the use of personal information. To make this effective and not just a pious declaration, each agency would be required to file an annual statement of the measures they were adopting to fulfill that duty with the Comptroller. If that official, with powers to inspect what was being done to make sure the plans were being followed, did not believe the measures are adequate, he would report that conclusion to the House and Senate Government Operations Committee for appropriate investigation and possible legislative action.

Senator Metcalf has introduced a bill to create an Intergovernmental Office of Consumers' Counsel, and in the course of doing so he has drafted several provisions in that bill which would put such a duty of using automatic data processing to supply information to the Congress and to the intergovernmental agencies from the various Government departments that have control over regulated companies.

Both of these actions would, in my opinion, set the kind of new ground rules for congressional supervision and review of executive agency computer usage that I think are essential to give proper protection to citizen rights.

Let me turn now to the particular issue of Federal personnel records and their computerization. As I mentioned before, perhaps the most important finding of our National Academy of Sciences study was that computers carry over and often intensify basic problems of civil liberties that are present already in the manual records. This is the way I read Federal personnel records in their computerization. There are two major issues that have long been present in the 1960's before computerization of civil service personnel files and files of various individual agencies.

The first is the issue of a right of access by the Federal employee to see those parts of the Federal record which are presently called investigative of security aspects, where there is no right of access, and little or no practice of granting access to the Federal employee. Yet the records circulate, they are relied on for all kinds of decisions as to promotion, assignment, travel, clearances, and so forth.

In the National Academy of Sciences study, we quoted Franz Kafka's book, "The Trial," in which he describes the fact that there are situations in which a record is created in a tribunal, and the person who is being accused of something that he is not sure of, thinks that a final adjudication has been reached, and that he is going to be cleared of what the charge is. And then he talks to the individual in the book who explains the proceeding to him who say that his case is not really over at all. Allegations are in the dossier, and the file is never purged, but at some later point another officer of the court will reach for the file and start the proceeding again. Therefore, one should never believe that the case is over, just that it is temporarily postponed.

Kafka wrote that story because he was trying to give, in a prescient way, a sense of what it is like to live in a society in which you can never get your records corrected and you never know what is in it.

I know you have other witnesses from the American Civil Liberties Union, various employee unions, and private counsel who have had experience with this problem, so I have not included in my testimony the kind of examples that will be presented to you by other witnesses. After you have heard those witnesses, I assume your conclusion will be that the issue of proper access to many parts of Federal employee files that are now closed is a subject your committee should look deeply into. This will become increasingly important as sources of information are computerized, and various aspects of the files that are presently entirely manual become automated.

The other issue from the manual era that has to be considered in terms of computer development is the question of what should be in the files at all, what information is proper to collect. Again, I know you are receiving testimony on this.

As a basis for the subcommittee considering the computerization issues, my statement suggests it will be valuable to circulate a survey questionnaire to each Federal agency, and to the United States Civil Service Commission, asking what information about employees is being currently collected in the files, whether they are manual or computerized, what right of access the individual has to various levels, or types, or classes of information in the file, and to ask a series of properly searching questions about which of these items of information rests on documentary evidence, which rests on belief and hearsay, and how decisions are made based on these files, and what are the uses of the files in terms of agency practice and civil service practice.

Mr. WALDIE. May I interrupt on that point. There is a Civil Service Commission data center. Do they have a file on every Federal employee?

Dr. WESTIN. It is my understanding that the official personnel folder is the centralized folder that maintains information on all persons who are processed by the Civil Service Commission.

Mr. WALDIE. Let me boil it down to this. Let us say the Naval Weapon Station in California hires a janitor as a civil service employee. Is there a file on that janitor in the Civil Service Commission?

Dr. WESTIN. That is my understanding but I am not certain enough of it that I would want my answer to be taken as final. I am not sure how much of the record is supplied centrally, and what is maintained locally, and how much the local record is an additional record to the central Civil Service Commission record. I am sure there are other witnesses who can tell you definitely.

Mr. WALDIE. I presume your three criteria—right of access, standards for exchange of information, and what information should be collected in the first place—would have an application to whatever file is kept, where it is kept—

Dr. WESTIN. Yes, sir. I would start with the central Civil Service Commission procedures and files and would add to that those that are added by the particular agency.

Mr. WALDIE. You use the term "central Civil Service Commission procedures and files." Why do you use that term? Is that the term of an article or your own description?

Dr. WESTIN. Those words are mine. My understanding is drawn from chapter I of the Civil Service Commission Regulations which speak in subpart G, section 294.701, which refers to the official personnel folder.

Mr. WALDIE. We will have the Civil Service Commission representative tomorrow. We can perhaps get an answer to these questions then. Maybe someone on our agenda can tell us precisely what we collect. I am somewhat lost.

Staff has given me a letter from Mr. Charles Sparks, Director of the Bureau of Manpower Information Systems of the United States Civil Service Commission.

Dr. WESTIN. Yes, sir, that refers to the particular files of the Civil Service Commission that have already been computerized or in the process of being computerized. I was going to mention it and I am glad to do so now. I have this to submit to the subcommittee.

The circumstances are, that having looked at the Civil Service Commission as one of our objects of inquiry for the National Academy of Science study, I asked Mr. Sparks, who is the Director of the Bureau of Manpower Information Systems, if he could, in preparation for my testimony, give me a statement of what the seven principal files are that are now being computerized by the Civil Service Commission and what the data elements are in those files. If you look under the seven files, there is a list of data elements which indicate every single item that is found in those files.

In addition, Mr. Sparks has provided in the first three pages a list of the rules of access, of confidentiality rules, and the policies that are followed there. I think this is partly responsive to your question. It does not go to what is in the manual files since it is not included in Mr. Sparks' response to my inquiry. For that I still think you would want to speak to witnesses for the Commission or other persons who are testifying here today.

Mr. WALDIE. Let me interrupt you once more. Have you made any inquiry into the amount of invasion of privacy or lack of restraint on the power to invade privacy that is possessed by the legislative branch in terms of Federal employees?

Dr. WESTIN. I followed the debate on the floor of Congress at the time of the debate by the House Internal Security Committee and presentations by Congressman Drinan and others of the use of the clippings in files by that subcommittee, and the way those are made available to the Civil Service Commission and other congressional sources and investigative agency sources. I understand there is other testimony that is going to be presented on that.

Mr. WALDIE. None of your inquiries dealt with that potential abuse?

Dr. WESTIN. No, sir, just a matter of following it in the press. We did not do any specific study on it.

Mr. WALDIE. Let me introduce Congressman Wilson.

Mr. Wilson, do you have any questions?

Mr. WILSON. I didn't know how long Dr. Westin was going to go on. I was hoping to ask him some questions.

Mr. WALDIE. You can interrupt him any time

Dr. WESTIN. I have a three-line conclusion——

Mr. WILSON. Why don't you conclude then?

Dr. WESTIN. I do endorse the Federal Employees Right To Privacy Bill. I testified in 1967 in support of this bill, and it seems that the bill's basic provisions have mellowed with age, like good wine mellowing in the casket. This is the right bill at the right time.

My statement closes that the time is appropriate for Congress to look at all of the issues. In the Watergate era, privacy needs all the help it can get.

Mr. WALDIE. We will proceed with questioning.

Mr. Wilson.

Mr. WILSON. The Federal employee privacy bill is certainly one which we ought to be acting on immediately. Perhaps we should even consider tougher legislation because of all those who are requesting an exemption from the bill. We are now exempting the FBI, and the DIA. Next we will be asked to exempt the Park Police and everyone who is involved in any police activity. If this keeps up we will wind up without a bill at all. Up to this time the reputation of the FBI has been so great, one would hardly think of doing anything that might interfere with any of the activities of that agency. I think now we recognize that we have been too lenient in the past and certainly I would hope that we could pass a strong bill protecting the privacy of our Federal employees.

I would be interested in knowing from you what exemptions you think would be reasonable in the right to privacy bill insofar as these various agencies are concerned.

Dr. WESTIN. On this, Mr. Wilson, I would support the statement Senator Ervin made in introducing his bill in the Senate on May 2d. There is a provision in the bill which allows the claim of national security at a particular time.

Second, it was suggested to Senator Ervin that there should be complete exemption for the Central Intelligence Agency. Upon reflection he decided against such changes. He states:

Moreover, recent Central Intelligence Agency disciplinary proceedings, in which requests for the presence of counsel or even of colleagues from the Agency have been summarily turned down, make clear the need for the protection of this legislation subject only to certain partial exemptions accorded to these agencies.

There are sections in there that provide this opportunity to claim in a particular proceeding a national security interest is at stake.

I think that approach, which does not give blanket immunity to an agency for some of the most important sections of the Federal Employees Right To Privacy Act, but allows some of these claims to be made, in an approach which does not immunize whole segments of the Federal bureaucracy. I think that represents a very good approach to the problem.

Mr. WILSON. Your statement goes beyond the right of privacy bill for Federal employees. It is the whole subject matter of computerization insofar as the public is concerned.

I am trying to recall a project which I think——

Dr. WESTIN. USAC project.

Mr. WILSON. You are concerned with that?

Dr. WESTIN. Yes.

Mr. WILSON. Is this discussed in your paper?

Dr. WESTIN. Not in my testimony, but we have some reference to this in the book, "Databanks In a Free Society," which answers any question.

Mr. WILSON. This is one project that seems to appreciate the grave dangers inherent in invading the privacy of our citizens. When we think of the fact that we are trying to develop a central databank that cities, counties, states, and the Federal Government can all share, well, I see it as a grave danger.

Dr. WESTIN. From a factual standpoint, these are demonstration programs where two communities are trying to develop municipal-wide information systems and are being given funds to develop subsystems, such as, in Long Beach, Calif., for public safety. The effort is being made to see what information could be amalgamated and what new patterns of information could be set in automated files.

I am struck by two things in these projects. First of all, they have paid considerable attention in their project-grant materials and in their site visits to the question of security and privacy protections. In one of the communities, Wichita Falls, Tex., they have enacted a unique municipal ordinance which provides a Data Access Control Board, made up of representatives of various agencies involved, to pass on questions of what information should be collected, the rules of confidentiality, and so on. The director of that board serves as an ombudsman to receive citizens' complaints.

My feeling is that if every act of computerization goes forward with the degree of concern and step-by-step asking of questions USAC has attempted—asking should this be included or shouldn't it, who should have access to this information, et cetera—we would be in a lot better shape than we are in today. In most municipalities, counties, cities, States, and Federal agencies there is not this kind of step-by-step concern for the protection of citizens' rights. I am not suggesting that all the decisions that have been reached in these USAC projects are necessarily ones that I approve of, but that the process is developing in a way that is exemplary.

The burden of my presentation has been, that computerization in the United States has essentially been in the interest and saving the needs of the executive agencies. We have to bring the legislature much more actively in this process, and more public interest groups.

Mr. WALDIE. Mr. Hogan from Maryland has arrived.

We are pleased to have you with us, and we will take the questions on the basis of the arrival of the members of the committee.

Mr. Hillis, you are next.

Mr. HILLIS. Thank you, Mr. Chairman.

Dr. Westin, I certainly have enjoyed your testimony here, this morning. I do not have any questions. I am here to get educated, and I thank you for throwing light on the subject.

Mr. WALDIE. Mr. Hogan.

M. HOGAN. I apologize for not being here earlier. I have no questions. I look forward to reading your testimony which I have before me.

Mr. WALDIE. Dr. Westin, we do appreciate you coming here today. We might have additional need for you at a later time in the hearings. We appreciate your opening this hearing for us. If we do desire to have you with us, we will get in touch with you. We appreciate your coming.

Without objection, we will include in the record this letter from Mr. Sparks, Director of the Bureau of Manpower Information Systems, addressed to Dr. Westin, dated May 10, 1973.

Dr. WESTIN. This being a hearing that deals with privacy, allow me to note that I checked in advance with Mr. Sparks, and he has no objection to it being in the record. I am betraying no confidence here.

[The letter referred to follows:]

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF MANPOWER INFORMATION SYSTEMS,
Washington, D.C., May 10, 1973.

DR. ALAN WESTIN,
Teaneck, N.J.

DEAR DR. WESTIN: I have developed the attached material on the Civil Service Commission's individual record file holdings and the procedures used for their protection in accordance with the agreements we reached during our recent telephone conversations.

Should you need additional enlightenment on the subject, please call me.

Sincerely yours,

CHARLES J. SPARKS, *Director*.

Attachments.

PROTECTION OF AUTOMATED INDIVIDUAL PERSONNEL RECORD HOLDINGS
OF THE CIVIL SERVICE COMMISSION

The Civil Service Commission has established and maintains several computerized files which identify individuals. There are seven major file holdings as follows:

1. Civil Service Registers of Eligibles.
2. The Annuity File.
3. The Commission's Internal Payroll File.
4. The Central Personnel Data File (CPDF).
5. The Federal Automated Career System File (FACS).
6. The Executive Assignment System File (EAS).
7. The 10% Federal Personnel Statistics Sample File (FPSP).

The data element coverage for each of these files is attached. A brief description of each file and how it is protected is indicated below.

1. *Civil Service Registers of Eligibles*.—Over the past few years the Commission has moved more extensively toward the maintenance of these registers in automated form. The registers are maintained in our Area Offices located throughout the country, primarily in punch card form. We are now moving toward computerizing these registers and providing on-line search capability. There are approximately 500,000 of these records maintained in the system. The Federal Personnel Manual (chapter 294—Availability of Official Information) governs the release of data from these registers. It states that the names of eligibles on civil service registers or their ratings, or relative standings on registers are not information available to the public.

2. *The Annuity File*.—The annuity file consists of records on over one million retired Federal employees or their survivors who are receiving civil service annuities. The file is primarily used for maintenance of data essential for

annuity determination and check preparation. The information in this file is deemed privileged and confidential and is not disclosed except to the individual himself or his or her authorized representative, or by court order.

3. *The Commission's Payroll File.*—The Civil Service Commission maintains an automated payroll system for its employees. Disclosure of information from these records, except to the individual concerned or his authorized representative is considered a clearly unwarranted invasion of personal privacy under the Commission's regulations.

4. *CPDF, FACS, EAS, and FPSP.*—These four file holdings provide the basis for the compilation of essential statistical data on the Federal civilian work force. In addition, FACS and EAS are used for referring qualified Federal employees to agencies for consideration in filling vacancies at the GS 13-18 grade levels. CPDF consists of approximately 2.7 million records that portray the status of Federal civilian employees demographically and in terms of the positions they occupy. FPSP covers 10% of these same employees from a work-history standpoint. FACS and EAS contain approximately 80,000 records that expand CPDF data coverage in terms of such things as work experiences, specialized knowledges, and mobility preferences.

The data contained in these files, for the most part, duplicates information maintained in paper records filed in Official Personnel Folders. The rules governing the release of these files are essentially those that apply to the folders. They are:

1. The name, present and past position titles, grades, salaries, and duty stations are releasable except when—
 - a. The release is prohibited under law or Executive Order in the interest of national defense or foreign policy,
 - b. The information is sought for commercial purposes or other solicitation,
 - c. The information is sought for political purposes.
2. Each individual or his designated representative can have access to his or her own record.
3. The release of candidate lists from FACS and EAS is made to Federal agencies for placement consideration.
4. The records may be used for statistical research purposes so long as the individual identification is not outputted.

The Director of the bureau who has primary responsibility for the file, determines the propriety of releasing individual record data from the files. FACS and EAS record printouts are made and furnished to each employee at specified intervals (12-18 months) for the employee's information, review, and correction as appropriate.

One of the items of data in CPDF is minority identification. Special controls are imposed on this data item:

1. The data is maintained physically in a separate file.
2. Input to the file follows rigidly prescribed procedures specified in the Federal Personnel Manual to insure that the data are properly derived and fully protected during the entire processing cycle.
3. Outputs are controlled by the Commission's Office of Federal Equal Employment Opportunity.

The Bureau of Manpower Information Systems has physical custody over all of the aforementioned computerized file holdings with the exception of civil service registers maintained in Area Offices. Procedures have been instituted to maintain positive physical security over these records and to protect them from unwarranted use. No name listings can be prepared from any file without the specific written authority of the responsible Bureau Director or his designee.

We are fully conscious of the need to insure that the privacy of the individual is protected in the control, utilization, and release of data from the Civil Service Commission's automated personnel file holdings.

TYPICAL CSC REGISTER OF ELIGIBLES

DATA ELEMENTS IN THE FEDERAL SERVICE ENTRANCE EXAMINATION
FILE OF ELIGIBLES

- | | |
|--|--------------------------------------|
| 1. Applicants Identification Number. | 15. Outstanding Scholar. |
| 2. Record Status—Active, Inactive, etc. | 16. Courses—Major. |
| 3. Grade 5 Rating. | 17. Courses—Minor. |
| 4. Certificate Preference Code for Grade 5. | 18. Languages—Fluent. |
| 5. Grade 7 Rating. | 19. Languages—Good. |
| 6. Certificate Preference Code for Grade 7. | 20. Desire Temporary Employment. |
| 7. Veterans Preference. | 21. Desire Travel. |
| 8. Legal Residence. | 22. Desire to Relocate. |
| 9. Verbal Ability. | 23. Region in Which Eligible. |
| 10. Quantitative Ability. | 24. Geographic Availability. |
| 11. Education. | 25. State of First Preference. |
| 12. Experience. | 26. Desire Work in Local Government. |
| 13. Educational Level. | 27. Kind of Work Desired. |
| 14. Quality Graduate—For use of Grade Point Average in Lieu of Exam- nation. | 28. Expiration Date. |
| | 29. Name of Applicant. |
| | 30. Date File Becomes Inactive. |
| | 31. Pending Education. |
| | 32. Apportionment Status. |
| | 33. Certification History. |

DATA ELEMENTS IN THE MASTER FILE OF THE BRIOH ANNUITANT SYSTEM

- | | |
|--|---|
| 1. Claim Prefix, Number and Suffix. | 30. Commercial Transaction Date or Register Number. |
| 2. Name of Annuitant. | 31. Social Security Number. |
| 3. Name of Designated Survivor. | 32. Social Security Number Code. |
| 4. Status of Case. | 33. Designated Survivor Relationship. |
| 5. Name Change Code. | 34. Designated Survivor Birth Date. |
| 6. Date of Birth. | 35. Designated Survivor Monthly Rate. |
| 7. Citizenship. | 36. Designated Survivor Voluntary Contribution Code. |
| 8. Sex and Marital Status. | 37. Social Security Number of Spouse. |
| 9. Agency. | 38. Social Security Code of Spouse. |
| 10. Separation Code. | 39. Effective Date of Health Benefits. |
| 11. Disability Code. | 40. Transaction Date of Health Benefits. |
| 12. Type of Award. | 41. Effective Date of Gross. |
| 13. Election Code. | 42. Transaction Date of Gross. |
| 14. Service Purchased Code. | 43. Medicare Status. |
| 15. Annuity Commencing Date. | 44. Effective Date of Medicare Status. |
| 16. Fiscal Year Issued. | 45. Transaction Date of Medicare Status. |
| 17. Joint Year of Birth. | 46. Medicare Status of Spouse. |
| 18. Provision Retired. | 47. Effective Date of Medicare Status of Spouse. |
| 19. Years/Months of Service. | 48. Transaction Date of Medicare Status of Spouse. |
| 20. High 5 Year Salary Average. | 49. Military Service Code. |
| 21. Final Salary. | 50. Special Handling Code. |
| 22. Total Regular Contributions. | 51. Type of Gross. |
| 23. Voluntary Contributions Including Interest. | 52. Next Prior Health Benefit Code. |
| 24. Interest on Voluntary Contributions. | 53. Next Prior Health Benefit Control Number. |
| 25. Monthly Voluntary Contribution Annuity. | |
| 26. Yearly Employee Share. | |
| 27. Group Life Insurance Amount. | |
| 28. Mass Change Code for Notification. | |
| 29. Drop or Restore Date. | |

CURRENT PAY SECTION

- | | |
|---|---|
| 1. Type of Action. | 11. First Other Deduction Code. |
| 2. Effective Date. | 12. First Other Deduction Amount. |
| 3. Transaction Date. | 13. First No Installment Due. |
| 4. Health Benefit Code. | 14. First No Installment Paid. |
| 5. Health Benefit Carrier Control Number. | 15. Elements 11 Through 14 Repeated for Second Through Fifth Deduction and Installment Items. |
| 6. Medicare Amount. | 16. Net. |
| 7. Medicare Code. | 17. Government Share of Health Benefits. |
| 8. Gross. | 18. Date of Latest Check/Voucher. |
| 9. Health Benefits Amount. | |
| 10. Code for Other Current Deductions. | |

NEXT PRIOR PAY SECTION

- | | |
|--|--|
| 1. Type of Action. | 10. First Other Deduction Amount. |
| 2. Effective Date. | 11. First No Installment Due. |
| 3. Transaction Date. | 12. First No Installment Paid. |
| 4. Gross. | 13. Elements 9 Through 12 Repeated for Second Through Fifth Deduction and Installment Items. |
| 5. Health Benefits. | 14. Net. |
| 6. Medicare Code. | 15. Government Share of Health Benefits. |
| 7. Medicare Amount. | 16. Date of Last Check. |
| 8. Code to Denote Excess Other Deductions. | |
| 9. First Other Deduction Code. | |

ADJUSTMENT, INITIAL PAY, CANCELLATION SECTION

- | | |
|------------------------------|---|
| 1. Type of Action. | 8. First Other Deduction Code. |
| 2. Period Covered From Date. | 9. First Other Deduction Amount. |
| 3. Period Covered To Date. | 10. Elements 8 and 9 Repeated for Second Through Sixth Deduction. |
| 4. Transaction Date. | 11. Net. |
| 5. Medicare Amount. | 12. Government Share of Health Benefits. |
| 6. Gross Amount. | |
| 7. Health Benefits Amount. | |

ADDRESS SECTION

- | | |
|-----------------------------------|------------------|
| 1. Mailing Address. | 3. Type of Payee |
| 2. Date of Latest Address Change. | |

FOLLOWUP AND MISCELLANEOUS SECTION

- | | |
|---|---------------------------------------|
| 1. Number of Previous Pay Changes. | 5. Optional Life Insurance Premium. |
| 2. Amount of Optional Life Insurance in Thousands of Dollars. | 6. Next Prior Life Insurance Premium. |
| 3. Normal Retirement Date. | 7. Voluntary Contribution to Date. |
| 4. Gross to Date for Taxable Income. | 8. Gross Year to Date. |

DATA ELEMENTS IN THE COMMISSION PAYROLL FILE

- | | |
|---|--|
| 1. Employee Number. | 12. Differential Code—Whether Subject to Tax; Type of Tax. |
| 2. Department Number. | 13. Differential Rate. |
| 3. Employee Name. | 14. Federal: |
| 4. Step of Grade. | A. Exemptions. |
| 5. Social Security Number. | B. Deductions. |
| 6. Service—Wage Board, General Service, Etc. | 15. State: |
| 7. Grade. | A. Exemptions. |
| 8. CSC Title Code—Describes Type of Job. | B. Deductions. |
| 9. Date of Last Grade Change. | 16. City: |
| 10. Base Pay Rate Code—Full-Time, Part-Time, Etc. | A. Exemptions. |
| 11. Base Rate. | B. Deductions. |
| | 17. Marital Status. |
| | 18. Pay Status. |

DATA ELEMENTS IN THE COMMISSION PAYROLL FILE—continued

- | | |
|-------------------------------|------------------------------------|
| 19. Retirement. | C. Used. |
| 20. Group Life Insurance. | D. Balance Forward. |
| 21. Health Benefits Code. | 43. Sick Leave : |
| 22. Hourly Rates : | A. Accrual Rate. |
| A. Regular. | B. Earned. |
| B. Overtime. | C. Used. |
| C. Night Differential. | D. Balance Forward. |
| 23. Tax Codes : | 44. Compensatory Leave : |
| A. City. | A. Earned. |
| B. State. | B. Used. |
| 24. Check Mailed or Not. | C. Balance Forward. |
| 25. Gross Pay. | 45. Leave Without Pay : |
| 26. Federal Tax. | A. Annual Balance. |
| 27. State Tax. | B. This Pay Period. |
| 28. City Tax. | C. Calendar Year Balance Forward. |
| 29. Retirement. | D. Annual Accrual Balance Forward. |
| 30. FICA. | 46. Year to Date Tabulations : |
| 31. Bond. | A. Gross Pay. |
| 32. Group Life Insurance. | B. Federal Tax. |
| 33. Group Health Insurance. | C. State Tax. |
| 34. Net Pay. | D. City Tax. |
| 35. Cost of Living Allowance. | E. Retirement. |
| 36. Union : | F. FICA. |
| A. Code. | G. Cost of Living Allowance. |
| B. Amount. | H. FICA Earnings. |
| 37. Charity : | I. Non-Taxable Income. |
| A. Code. | 47. Quarterly Tabulation : |
| B. Amount. | A. FICA Earning. |
| 38. Miscellaneous Deduction : | B. FICA Deductions. |
| A. Code. | C. State Earnings. |
| B. Amount. | D. State Tax. |
| 39. Miscellaneous Earnings : | E. City Earnings. |
| A. Code. | F. City Tax. |
| B. Amount. | 48. Bond : |
| 40. Optional Life Insurance. | A. Cost. |
| 41. Allotment : | B. Number Issued. |
| A. Code. | C. Issue Date. |
| B. Amount. | D. Bond Balance Forward. |
| 42. Annual Leave : | E. Pay Period of Last Change. |
| A. Maximum Carry Over. | F. Current Pay Period. |
| B. Earned. | |

DATA ELEMENTS IN THE CENTRAL PERSONNEL DATA FILE

- | | |
|---|--|
| 1. Name. | 15. Occupation Code. |
| 2. Title (Mr., Miss, Mrs.). | 16. Functional Classification of Scientists and Engineers. |
| 3. Birth Date. | 17. Grade or Level. |
| 4. Citizenship. | 18. Step or Rate. |
| 5. Social Security Number. | 19. Pay Basis. |
| 6. Veteran Preference. | 20. Salary. |
| 7. Tenure Group. | 21. Location Code. |
| 8. Service Computation Date. | 22. Position Occupied. |
| 9. Handicap Code. | 23. Work Schedule. |
| 10. Federal Employees Group Life Insurance. | 24. Pay Rate Determinant. |
| 11. Retirement. | 25. Special Program Identifier. |
| 12. Nature of Personnel Action Code. | 26. Retired Military. |
| 13. Effective Date of Action. | 27. Agency Code. |
| 14. Pay Plan. | 28. Submitting Office Number (SON). |

ADDITIONAL ELEMENTS BEING COLLECTED

- | | |
|--|---|
| 1. Minority Group Identification (Separate File). | 4. Yr. Highest Degree Attained. |
| 2. Supervisory Position. | 5. Academic Discipline. |
| 3. Highest Educational Level. | 6. Training Courses Completed, Course Title and Content, and Cost. |

DATA ELEMENTS IN THE FEDERAL AUTOMATED CAREER SYSTEM

- | | |
|---|--|
| 1. Social Security Account Number. | 33. Interest in Detail to State, County, or City Government. |
| 2. Birth Date. | 34. Interest in Detail to International Organization. |
| 3. For CSC Use Only. | 35. Interest in Detail to Task Force or Other Special Assignment. |
| 4. Citizenship. | 36. Highest Level of Education Attained. |
| 5. Veteran Preference. | 37 and 38. Degrees Received and Aca- demic Majors. |
| 6. Tenure Group. | 39. Year Most Recent Degree Completed. |
| 7. Service Computation Date. | 40. Training. |
| 8. Submitting Office Number. | 41. Licensees/Special Skills. |
| 9. Duty Station. | 42. Language Other Than English. |
| 10. Agency and Suborganization. | 43. Other Language Write-in. |
| 11. Name. | 44. Patents Held. |
| 12. Classification Series. | 45. Books Published. |
| 13. Pay Plan. | 46. Awards Within Last Five Years. |
| 14. Grade Level. | 47. Types of Awards. |
| 15. Salary. | 48. Highest Number Supervised. |
| 16. Position Status. | 49. Special Abilities and Talents. |
| 17. Date Entered Current Grade. | 50. Outside Activities. |
| 18. EOD Current Agency. | 51. Types of Outside Activities. |
| 19. Current Position—Specialty. | 52. Exam by Which Entered. |
| 20. Current Position—Function. | 53. Grade at Entry. |
| 21. Current Position—Environment. | 54. Number of Years Military Service. |
| 22. Date Entered Current Position. | 55. Times Left Government. |
| 23. Prior Relevant Experience—Series. | 56. Number of Agencies Served In. |
| 24. Prior Relevant Experience— Specialty. | 57. Reinstatement Rights. |
| 25. Prior Relevant Experience— Function. | 58. Street Address of Residence. |
| 26. Prior Relevant Experience— Environment. | 59. City. |
| 27. Prior Relevant Experience—Last Year of Experience. | 60. Date Form Completed. |
| 28. Prior Relevant Experience— Organizational Type. | 61. State or Country. |
| 29. Current Interest in Job Change. | 62. Zip Code. |
| 30. Willingness to Accept Lateral. | 63. Prior Experience. |
| 31. Geographic Preference. | |
| 32. Willingness to Travel. | |

EXECUTIVE INVENTORY SYSTEM

1. Name.
2. Home Address.
3. Social Security Number.
4. Place of Birth.
5. Birth Date.
6. U.S. Citizen.
7. Service Computation Date.
8. Submitting Office Number.
9. Duty Station.
10. Agency Code.
11. Pay System.
12. Present GS Series, If Any.
13. Annual Salary.
14. Status of Present Position.
15. Personal Career Status.
16. Present Grade.
17. CSC Certificate No.
18. Veteran Preference.

EXECUTIVE INVENTORY SYSTEM—continued

19. Work Experience—For Each Position List :
 - A. Dates (Month/Year).
 - B. Grade, Rank, or Salary.
 - C. Type of Position :
 - (1) Full-Time.
 - (2) Part-Time (Number of Hours per Week).
 - (3) Special Assignment.
 - (4) Special Consultant.
 - D. Employing Organization.
 - E. Major Organizational Subdivision.
 - F. Location of Employment.
 - G. Name, Title, Current Address and Phone of Immediate Supervisor.
 - H. Title of Position (of Applicant).
 - I. Basic Nature, Responsibilities, and Duties; Knowledges, Skills, and Abilities Required.
 - J. Occupational Codes.
 - K. Job Function Code.
 - L. Organization Type.
 - M. Activity Area.
20. Occupational Codes for Positions not Described in "Work Experience."
21. Job Function Codes for Positions not Described in "Work Experience."
22. Education :
 - A. Level of Education.
 - B. Number of College Scholastic Honor Societies of Which a Member.
 - C. Type of Degree Earned (e.g., BA, PhD).
 - D. Year Degree Granted.
 - E. Coded Major or Majors.
 - F. Whether Degree Granted with Honors.
 - G. Institution Granting Degree.
23. Education, Degree not Awarded :
 - A. Level of Education.
 - B. Year Last Attended.
 - C. Coded Majors.
 - D. Number of Academic Years.
 - E. Degree, Diploma, Certificate, if Any.
 - F. Name of Institution.
24. Professional Activities, Honors, and Special Qualifications :
 - A. Professional License to Practice and Jurisdiction Where Recognized.
 - B. Membership in Professional Groups or Societies.
 - C. Number of Times in Past 10 yrs. Elected or Appointed to an Office in a Professional Society.
 - D. Number of Times in Past 10 yrs. Elected or Appointed to an Office in a Civic Group.
 - E. Number of Patents Held and Year of Latest.
 - F. Number of Books Published and Year of Latest.
 - G. Number of Professional Articles Published and Year of Latest.
 - H. Number of Books Edited and Year of Latest.
 - I. Editorship of Professional Journal in Last 10 yrs.
 - J. Ever Employed Outside U.S. as Civilian or Military.
 - K. Ever Operated Own Business.
 - L. Special Managerial and/or Supervisory Experience.
 - M. Special Communication Ability.
 - N. Faculty Status During Last 5 yrs.
 - O. Part-Time Teaching During Last 5 yrs.
 - P. Number of Positions Held at GS-13 and Above in Federal Service.
 - Q. Number of Positions Held in Federal Service.
 - R. Number of Awards from Employing Organizations.
 - S. Number of Awards from Non-Employing Organizations.
 - T. List of Two Items Above.
 - U. Number of Training Programs Attended.
 - V. List of Training Programs Attended.
 - W. Largest Number of Employees Supervised.
 - X. Type of Professionals with whom Close Working Association has been Established.
 - Y. Foreign Area Expertise.
 - Z. Foreign Language Ability.

25. References :
 - A. Name.
 - B. Address.
 - C. Telephone Number.
26. Additional Comments.
27. Personal Preferences and Other Information Relevant to Assignment :
 - A. Willingness to Change Job.
 - B. Other Agencies in Which Interested.
 - C. Other Kind of Work in Which Interested.
 - D. Other Geographic Area in Which Interested.
 - E. Disabilities Affecting Assignment.
 - F. Family Disabilities Affecting Assignment.
28. General Information (for Statistical Analysis Only) :
 - A. Type of Organization in Which Career Began.
 - B. Legal Residence at Time of 1st Federal Appointment.
 - C. At what Grade was 1st Federal Appointment.
 - D. Highest Educational Level Completed at Time of 1st Federal Appointment.
 - E. Reason for Entering Federal Service.
 - F. Intentions as to a Federal Career Upon Entering Federal Service.
 - G. Means of Entering Federal Service (FAME, FSBE, etc.).
 - H. Number of Yrs. Worked for Federal Government.
 - I. Number of Yrs. Worked in Present Agency.
 - J. Number of Yrs. of Active Military Service.
 - K. Military Reserve Status.
 - L. Number of Times Left Federal Employment.
 - M. Number of Years at Each Grade Above GS-10.
 - N. Number of Times Changed Jobs in Last 5 yrs.
 - O. Type of Training Interested in Receiving.
 - P. For GS-16 and Above Only ; At the Time of 1st Supergrade Appointment :
 - (1) How Long in That Agency Before Appointment.
 - (2) How Long in Federal Service.
 - (3) Where Employed.
 - (4) Age.

DATA ELEMENTS IN THE FEDERAL PERSONNEL STATISTICS PROGRAM

- | | |
|---|--|
| 1. Social Security Number. | 14. Work Schedule. |
| 2. Date of Birth. | 15. Effective Date of Last Personnel Action. |
| 3. Sex. | 16. Pay Plan. |
| 4. Name. | 17. Occupational Code. |
| 5. Most Recent Entrance into Federal Service Without Break in Service : | 18. Grade or Level. |
| A. Type of Appointment. | 19. Salary. |
| B. Date. | 20. Pay Basis. |
| C. Salary. | 21. Functional Classification. |
| 6. Original Entrance into Federal Service (if different from above) : | 22. Duty Station Location Code. |
| A. Type of Appointment. | 23. Position Occupied. |
| B. Date. | 24. Agency and Subagency Code. |
| C. Salary. | 25. Submitting Office Number. |
| 7. Veteran Preference. | 26. Date of Present Grade or Level. |
| 8. Tenure. | 27. Date of Last Promotion. |
| 9. Service Computation Date. | 28. Pay Status. |
| 10. Physical Handicap. | 29. Special Program Identifier. |
| 11. FEGLI. | 30. Step. |
| 12. Retirement. | 31. Retired Military. |
| 13. Personnel Action Code (Latest). | 32. Pay Rate Determinant. |

Mr. WALDIE. Our next witness is Mr. Speiser. Mr. Speiser represents the American Civil Liberties Union.

Mr. Speiser, you may have been here and got caught up in the first question or two. By the way, before going further, your statement, if you desire, will be included in the record in its entirety. Do you have any objections?

Mr. SPEISER. No.

[The prepared statement follows:]

PREPARED STATEMENT OF LAWRENCE SPEISER ON BEHALF OF
THE AMERICAN CIVIL LIBERTIES UNION

My name is Lawrence Speiser. I am appearing here today on behalf of the American Civil Liberties Union. I am an attorney in private practice in Washington, D.C., and a member of the Executive Board of the American Civil Liberties Union of the National Capital Area.

The ACLU is grateful for the opportunity to testify in support of legislation to protect the employees of the Executive Branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy.

The importance of this legislation is best gauged against the national trend which is making ours a "surveillance society." In the past few years, we have learned of wide-spread spying by the military on private citizens, including Congressmen, journalists, artists and public officials. We have been told of the existence of innumerable FBI dossiers on individuals not suspected of any crimes. Private credit companies and insurance companies routinely collect derogatory information about individuals unconnected with their ability to pay their bills, or their ability to drive cars.

But the largest group that is victimized by the increasingly conspiratorial atmosphere in our country are our more than four million civilian federal employees. Under the guise of a "suitability" program, government agencies routinely interrogate employees and potential employees about their private associations and political views. They investigate employees' private sexual practices and family relationships in an effort to gather information that has nothing whatever to do with an employee's ability to perform his job.

The impulse of government officials to collect derogatory and irrelevant information about federal employees and thus to enforce a vague and mythical standard of "suitability" is more than just a wasteful bureaucratic folly. These practices damage the morale of federal workers and cast the government in the role of "Big Brother," a role more consistent with totalitarian philosophy than with American principles of an open and democratic society. Thus, in seeking to insure the political loyalty of its employees, the government undermines their loyalty to the very institutions of government itself in profound, and in some cases, irreparable ways.

We have no way of knowing how many hundreds of thousands of government employees have been subjected to irrelevant and humiliating investigations into their private lives. Obviously, the majority who have been put through the investigative mill—with careers at stake, or money to earn to support their families—have no alternative but to knuckle under to government interference with their rights and invasions of their privacy. It is only the exceptional man or woman who has the courage or the resources to fight back and to expose government excesses of investigation and interrogation. Taking into account the grave consequences to those who dare to protest these excesses, it is surprising indeed that so many government employees have ignored the risks and decided to fight for their rights.

One courageous man who decided to make just such a fight is well known to this Committee. He is A. Ernest Fitzgerald, the Pentagon costs analyst who was fired in retaliation for revealing to Congress the \$2 billion cost overrun on the C-5A plane. In the course of trying to "get" Mr. Fitzgerald, the Pentagon created a special dossier on him in which it included unsupported judgments (i.e., someone said he was a "pinch-penny"), as well as attempts to impugn his private associations. In spite of efforts over a three-year period by Mr.

Fitzgerald and his ACLU lawyers, they have not been able to secure full access to the contents of this secret file or to correct the erroneous information it contains.

SEXUAL INVESTIGATIONS

The government's most outrageous incursions into private conduct concern its campaign against homosexuals. The case of Benning Wentworth, one of four similar ACLU cases, is typical. The Internal Security Review Board of the Department of Defense attempted to revoke Mr. Wentworth's industrial security clearance although he had held it for fourteen years without incident. The Board contended that as a homosexual Mr. Wentworth might be subject to blackmail. Mr. Wentworth countered that since he was an avowed homosexual, whose family and friends were aware of his sexual preferences, he was no more a candidate for blackmail than a heterosexual.

The Internal Security Review Board then subjected Mr. Wentworth to an inquisition into the most intimate details of his private sex life. Among the questions asked him were the following:

"Do you have any recollection when you had your first homosexual experience?"

"What did it consist of?"

"About how many experiences did you have in grammar school? Did you have an emission?"

"With how many partners did you have homosexual experiences at college?"

"As far as your relationship . . . could you define, or could you explain the type of relationship you had, that is, the mechanics or tactics or technique?"

"Were you the inserter or were you the receptor?"

"Did you find anything sexually stimulating, in acts which you performed, which caused you or your partner to have an arousal, for example?"

"Did you masturbate in his presence, and he in your presence, or did you masturbate each other?"

And so on and on and on, in what the U.S. District Court characterized as "a shocking array of questions."

Ultimately, the District Court ruled that there was no rational connection between Mr. Wentworth's admitted homosexual preferences and the Security Board's revocation of his industrial security clearance. It further found that the Board's inquiries into sexual matters were so totally uncircumscribed by any discernable standards as to preclude reliance on administrative records compiled "in flagrant violation of fundamental rights to privacy and due process." The Court ordered Mr. Wentworth's clearance restored forthwith.

As noted above, this is one of four ACLU cases in which the government attempted to revoke industrial security clearances and to force answers to intimate questions. In all four interrogations, the same disregard for privacy, the same salacious and prurient interest is revealed by the questions.

When dealing with homosexuals, the government applies the rule of guilt by association, as demonstrated by another case in which a federal employee's record carried the notation that he was a questionable security risk because he was thought to associate with someone who was thought to have homosexual tendencies.

The prurient interest of government investigators is not, however, confined to homosexuals. A young unmarried woman employee of a federal agency was informed by her superiors that the FBI had been told that she was engaged in sexual relations with at least one man to whom she was not married. She was interrogated exhaustively about her sex life and then told that she might lose her job if she were not successful in "clearing" herself of the charges. The agency resisted permitting her to be represented by counsel, but after she secured the aid of an ACLU volunteer lawyer, she was told that she would not be fired at this time, but she was instructed that she was not to let any man come to her apartment and was not to associate with one particular man with whom she had been friendly.

Her ACLU lawyer requested written clarification of the agency's position on this matter, asking whether it is indeed the policy of the agency that the young lady might not see any man in her home and might not see or associate in any way with the particular individual named by the agency.

After many letters and telephone calls by the ACLU lawyer to the agency, the agency backed down. It stated that it had no action pending against the

young woman, that it was not agency policy to infringe on the private activities of employees in their off-duty hours, but that it expected employees to conduct themselves in such a way as not to reflect discredit upon the employing office.

The FBI, for its part, evidently expects applicants for employment to detail their sexual activities on their employment form. In a letter to an employee threatening to fire him, one of the reasons stated is as follows:

"At the time you were interviewed as an applicant for the position of Special Agent, you were specifically asked: 'Is there any incident, including arrests or traffic violations other than parking tickets, or information concerning the applicant himself, or a relative, which might tend to reflect unfavorably upon the applicant's reputation, morals, character, ability or loyalty to the United States which the applicant wishes to explain?' and (you) answered No. The obvious intent of this question is to determine any character or moral defects which might have a bearing on the selection process. Your failure to disclose the extramarital affair you engaged in during 19— to 19— with Mrs. ----- was deceitful and reflects a lack of integrity."

The FBI letter continues with a reproach to the employee for his reluctance to discuss the details of his relationship with the woman in question with FBI interrogators.

QUESTIONS ON MENTAL HEALTH

In addition to the invasion of privacy involved in questions on mental health, the questions themselves are marked by imprecision, and the answers are judged by those with no qualifications to make such judgments. Question 26 on Form 171 asks, among other things, whether the applicant has ever had a nervous breakdown.

There is no accepted definition of what is meant by a nervous breakdown. This is a question, also, which encompasses the present to the far distant past. If an individual had been in a mental hospital thirty years ago, or had a spell of depression at home a quarter of a century ago, what possible difference does that make *now* to the federal government.

In an ACLU case this year, a Peace Corps employee was asked: "Have you ever been treated for a mental condition?" on the job application form. He answered "no." The government charged that he had answered falsely, since at one time he had gone to a psychiatrist. The ACLU, with the help of the American Psychiatric Association, takes the position that visiting a psychiatrist does not connote a "mental condition" and that the applicant's answer was correct.

Then the government demanded that the employee give them access to his psychiatrist's records. When he refused, he was fired.

QUESTIONS ON POLITICAL BELIEFS AND ASSOCIATIONS

S. 1688 and H.R. 1281 wisely outlaw the kinds of abuses we have outlined above—irrelevant and humiliating probes into the private lives of federal employees. We believe these bills should be broadened to prohibit specifically interrogation and investigation into an employee's political beliefs and associations as well. Surely freedom of association is as fundamental a right as sexual privacy, and this legislation, aimed at protecting the constitutional rights of federal employees, is an appropriate place to ban these unwarranted inquiries.

The only law presently in effect which denies public employment for political beliefs or associations is 5 U.S.C. §118(p), which bars from federal employment any individual who:

1. advocates the overthrow of our constitutional form of government in the United States;
2. is knowingly a member of an organization that so advocates; and
3. participates in any strike against the government.

The ACLU believes that this law is still unconstitutional, but it has been narrowed by judicial decision. It had previously banned employees from asserting the right to strike or belonging to organizations which asserted the right to strike. In a decision not appealed by the government, a three judge federal court ruled this provision unconstitutional on First Amendment grounds. *Blount v. National Association of Letter Carriers*, 305 F.Supp. 546 (D.D.C. 1969). The government has also been barred by judicial decision from requiring employees to take oaths as to their political beliefs and memberships. *Stuart v. Washington*, 301 F.Supp. 610 (D.D.C. 1969) (three-judge court); *Soltar v.*

Post Master General, 277 F.Supp. 579 (N.D. Cal. 1967); *Zuckerman v. United States*, — F.Supp. — (D. Minn. 1971). In addition, the government's power to ask questions about memberships and associations has been limited by the Supreme Court. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Baird v. Arizona*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971).

No other law passed by Congress sets any other disqualifications based on political belief or association. The loyalty program for federal employees begun by President Truman in 1947 was repealed by President Eisenhower, who replaced it with a security program, as outlined in Executive Order 10450. This security program has been held by the Supreme Court in *Cole v. Young* to be limited to sensitive jobs—that is, those affecting national security.

The Civil Service Commission has chosen to ignore the Supreme Court's limitation. For example, Standard Form 85 requires all employees who are going to work in non-sensitive positions to answer the following question:

8. Organizations with which affiliated (past and present) other than religious or political organizations or which show religious or political affiliations (if none, so state).

The form of the question suggests that the political organization exception refers only to organizations connected with political parties. Since no other explanation is given, employees may be required to list organizations such as the League of Women Voters, American Legion, National Rifle Association, Americans for Democratic Action, Americans for Constitution Freedom, the John Birch Society, Friends Committee on National Legislation, Chamber of Commerce or American Civil Liberties Union. None of these organizations is a "political" organization in the sense that it is connected with a political party, but all of them take positions on legislation. The exception for "political affiliations" is meaningless in protecting the right of individuals from inquiry as to their political beliefs.

The form also contains a warning that a false statement on the form is punishable by law, and requires each new employee to certify that his statements are "true, complete and correct to the best of his knowledge and belief and are made in good faith." This means that if the employee fails to disclose all of the organizations with which he has ever been affiliated, he may be subject to discharge, barred from civil service, and also subject to criminal prosecution for giving false information.

But as objectionable as these questions to employees are—since they arrogate to the Civil Service Commission powers not given to it by Congress and outlawed by the Supreme Court—even more objectionable is the "suitability" program run by the Civil Service Commission. Under this program, the Commission conducts background investigations which involve questioning friends and neighbors about the political views and associations of employees. And the agencies have enthusiastically adopted the Commission's investigative methods in making their own inquiries.

When the ACLU's representative, Hal Witt, testified on a previous Government Employees Rights Bill in 1971, he outlined six cases "all involving non-sensitive jobs—with absolutely no security ramifications." The description of these cases is attached to this testimony.

In the intervening two years, nothing has changed. Government investigators are using the same techniques, asking the same irrelevant questions, relying on the same undocumented gossip, and taking the same arbitrary actions, as the following examples demonstrate:

A researcher in a non-sensitive job at HEW was informed by her superiors that her normal three-year security clearance for non-sensitive foreign travel was being limited to a one-year clearance. The reason given for the limitation was the anti-war activity of the researcher's son. The three year clearance was restored following the protest by ACLU in this particular case, but the general practice of HEW of requiring special security clearance for non-sensitive travel by HEW personnel continues.

Two woman FBI clerks volunteered to do some anti-war work on their off duty time. They were fired without a hearing. More than a year of litigation followed before the U.S. District Court ordered that they be re-hired, given full back pay, and have any derogatory notations removed from their personnel files.

A probationary employee was fired from HEW without a hearing on the ostensible grounds of "inefficiency." But her discharge came after an intensive investigation and interrogation into the espousal of her political views on her off-duty time. The Civil Service Commission was ordered to hold a hearing by the U.S. Court of Appeals because the Court was convinced that "inefficiency" was just a subterfuge for interference with this employee's First Amendment rights.

A long-time State Department employee was selected out for "inefficiency" and again "inefficiency" was the subterfuge, not the substance of the charge against him. This case began in 1968 when the employee signed an anti-war advertisement and was threatened with an adverse entry in his file. ACLU represented the employee then, but voluntarily dropped its lawsuit when the State Department ruled that no adverse entry would be made.

In the intervening years, however, the Department established a secret derogatory file on him, and departmental correspondence showed that his superiors deliberately planned to build an "inefficiency" case against him so that they could get rid of him without having to base their actions on his political beliefs.

A young woman who had been a temporary employee of HUD for a year and a half was notified by the agency that her job was being terminated because there was "no other work available." (The practice of government agencies in keeping female clerical workers on as temporaries for years for budgetary reasons, thus depriving them of the protections of regular career status, is another way in which government employees are victimized. It is deserving of special legislative consideration by the appropriate Senate and House Committees.)

Since the young woman knew that her section was shorthanded, and since she had often been praised for her conscientiousness and efficiency, she attempted to learn the real reason for the termination. She was finally told by a supervisor that she was being fired for her "moral" character (i.e. her private sexual relations) and because "there are a lot of people in this office who are more loyal to the United States than you are." She was then told that an FBI report had been made which allegedly raised questions about her loyalty, although she has as yet been unable to secure a hearing or to determine the exact nature of the allegations against her.

A clerk at NIH was asked by the Civil Service Commission to respond to questions about her alleged membership in the Communist Party some 27 years previous. The charge was made, she was told, by a "reliable" (but anonymous) informant. She was also accused of having attended meetings twenty-seven years ago at which communists were present, and asked to say whether or not her husband was a communist.

The allegations against the clerk were false; she was advised by her ACLU counsel not to respond to the interrogatories, and the Civil Service Commission eventually withdrew them. But despite this outcome, considerable damage had been done. For the Civil Service Commission routinely follows the practice of immediately forwarding any derogatory information to the employee's agency, even before the employee has had the opportunity to respond to the allegations against him or her, or for the Civil Service Commission to determine their validity or groundlessness. Such information, as is well known, contains gossip, innuendo, half-truths, and plain falsehoods. As a government employee, incalculable harm was done to her by spreading this false information to the agency where she was employed.

Virtually the same procedure was followed in the case of another Clerk-Typist in a non-sensitive job. Again, the questions going back more than a quarter of a century; the protest by counsel; the withdrawal of the questions, and finally, the circulation nevertheless of information from the "reliable" anonymous informant to the employing agency.

ARREST RECORDS

When Mr. Witt testified for the ACLU in 1971 on H.R. 7199, to protect government employees' rights and to prevent invasions of their privacy, we noted that the Civil Service Commission's Federal employment application form had formerly carried a question which read as follows:

Have you ever been arrested, taken into custody, held for investigation or

questioning, or charged by any law enforcement authority? (You may omit: (1) Traffic violations for which you paid a fine of \$30.00 or less; and (2) Anything that happened before your 16th birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)

Mr. Witt then noted that in August 1966, that question had been replaced with the following:

Have you ever been convicted of an offense against the law or forfeited collateral or are you now under charges for any offense against the law? (You may omit: (1) Traffic violations for which you paid a fine of \$30.00 or less and (2) any offense committed before your 21st birthday which was adjudicated in the juvenile court or under a youth offender law.)

The ACLU applauded that change. We said: "It shows a keen awareness of a problem which has haunted individuals who have been arrested through no fault of their own and against whom no criminal charges were ever placed or who ultimately were acquitted. Also, excluding juvenile offenses committed prior to the age of 21 gives vitality to the concept that juvenile court proceedings are not to be considered convictions of crime."

It now appears that our congratulations were premature. Although the question has indeed been changed, it does not indicate the "sensitivity" that we applauded. It simply indicates that arrest information is made available to the Civil Service Commission routinely through the FBI. The change in the question was made to placate employees' groups and civil libertarian organizations, but the practice of considering arrest records not followed by convictions as an element in suitability continues to this day.

In a deposition in the case of *Menard v. Mitchell*, Beverly E. Ponder, Chief of the Technical Section, Identification Division of the FBI, gave the following testimony:

"Q. Do federal agencies, in particular the Civil Service Commission, receive at present all information about arrests, or only arrests with convictions, when they apply to the FBI?"

"Mr. PONDER. They receive all the material that appears on the identification records."

"Q. And that includes conviction and non-conviction arrests?"

"Mr. PONDER. That is correct."

As to not requiring listing of juvenile records, the removal of the question from the application form has no effect on the on-going practice. Again, Mr. Ponder's deposition:

"Q. Does the FBI make any distinction in its records between juvenile and adult arrest records?"

"Mr. PONDER. There is no distinction made in FBI identification records."

"Q. Are there any differences in dissemination practices, with respect to juveniles and adults, of arrest records?"

"Mr. PONDER. No."

"Q. How long does the FBI retain juvenile records?"

"Mr. PONDER. We retain all records, including juvenile records, until the arresting agency requests their return."

It should be noted that the Youth Offender Act requires the expungement of juvenile arrest records after two years. But the FBI continues to disseminate them, and the federal government continues to receive them long after this period is up. Expungement of these records, like deletion of the question on arrest records, is part of an elaborate charade played by the Civil Service Commission and other government agencies.

The Civil Service Commission not only receives such records from the FBI, it considers them as an important element in "suitability." The Federal Personnel Manual currently in use states in Sub-Chapter 2—Suitability Disqualifications:

"An arrest record may have a genuine bearing on a person's fitness for federal employment even though there was no criminal conviction. Some arrested persons are not brought to trial because of the disappearance of witnesses or an unwillingness on the part of those concerned to prosecute."

RIGHT TO COUNSEL

In 1964, Senator Ervin's subcommittee made a survey of all government agencies on the right to counsel in security interviews. That survey found that

only the Civil Service Commission, the U.S. Information Agency and the Navy Department did not permit counsel during interviews while other agencies which dealt with highly sensitive materials such as other Defense Department components, including the National Security Agency, as well as the Atomic Energy Commission, did allow counsel at such interviews.

The Civil Service Commission has since announced that it has changed its policy, and that it does permit counsel to be present.

The right to counsel is, of course, basic to securing the rights enumerated in this legislation, and it has long been recognized that while investigations and interrogations are not part of a criminal prosecution, the loss of employment is a sufficient deprivation to require the traditional safeguards of due process.

In at least one case in which I participated, the results of the 1964 survey do not square with today's practices. I was told by two officers of the State Department that "it is a government-wide policy not to permit attorneys to be present during interviews, particularly those that are conducted under Executive Order 10450." I was further informed that the State Department had a policy only of permitting counsel to sit *outside* an interrogation room, available only if the individual being interviewed wanted to come outside to consult with him. Furthermore, the State Department official indicated that he had consulted with an advisor in the Department of Justice who indicated that it was government-wide policy *not* to permit attorneys to be present during such interrogations.

COMMENTS AND RECOMMENDATIONS

There are several elements in this bill on which we have not commented in detail, but on which we would like to make some brief notes:

Questions on race.—We applaud the purpose of the prohibition on questions concerning race, but feel that it might be necessary to gather information about the race of applicants so that patterns on practices in hiring, assignments, promotions and other personnel practices among persons of various races may be examined. Some consideration ought to be given to permitting racial information to be sought at least for statistical purposes, in order to combat racial discrimination.

Coerced activity.—We agree with the prohibition against pressuring employees to attend meetings not connected with their duties, to buy bonds, to give to the United Givers Fund, etc.

Psychological testing.—Our position remains the same as in our previous testimony. We wholeheartedly support the provisions barring the use of psychological tests which would elicit information concerning personal relationships with relatives or concerning religious beliefs or practices, or attitudes or conduct with respect to sexual matters. We would go even further and bar questions and testing concerning attitudes on racial matters or political views.

Exclusion of agencies.—S. 1168 and H.R. 1281 both exclude the CIA, the National Security Agency and the FBI.

We do not think that employment by these agencies ought to carry automatically the price of denial of constitutional rights. There has been no showing that national security or law enforcement will suffer if employees are guaranteed that they will not be treated as second-class citizens. And as documented in two instances in this testimony, the FBI has deprived three employees of their constitutional rights where no considerations of national security and law enforcement were at stake. We would hope that the Subcommittee makes a serious attempt, at the very least, to limit sharply the scope of any such exceptions.

We have already endorsed the prohibitions against inquiry into sexual matters and mental health. We also support the prohibition against making any report concerning any activity or undertaking of the employee not involving his official duties. We would recommend, however, a specific prohibition against inquiry into an employee's political views and association, so that this heritage of McCarthyism which is, unfortunately, still a pervasive influence within the government, may be rooted out.

We also believe that these prohibitions should include not only rules against direct inquiry of the applicant, but a barrier against these irrelevant criteria being used in determining hiring or any other personnel decision.

CONCLUSION

We applaud the spirit of this legislation, a spirit which seeks to extend to government employees the most precious right of privacy. We believe that passage of a strong bill on this subject will be an important example to the country. Replacing secrecy with candor and star-chamber methods with due process will help to restore faith in the goal of an open, free society.

Thank you.

**STATEMENT OF LAWRENCE SPEISER ON BEHALF OF THE
AMERICAN CIVIL LIBERTIES UNION**

Mr. SPEISER. Thank you, Mr. Chairman.

Mr. WALDIE. The general question that I would like to address—perhaps you addressed it in the statement—is, could you give us a kind of picture, a complete picture of precisely what personnel records are kept by the executive branch as to which the possibility of abuse of privacy is applicable? Is there a manner in which that system of recordkeeping of personnel records can be described? Is there a top and bottom to it, a structure? Is there, on the legislative branch, with the exception of the House Internal Security Committee, of which I am aware, a counter or duplicate effort on the part of the personnel recordkeeping of Federal employees that is equally subject to abuse of privacy? Is this in the judicial system, or are we only dealing with the executive branch and its recordkeeping functions and the necessity of controlling that personnel recordkeeping function in terms of privacy? That is a complicated question, but if you take a shot at it I would appreciate it.

Mr. SPEISER. I do cover the question, I guess, by a number of horrible examples in my testimony, and I will leave it to you gentlemen, to read that.

Mr. WALDIE. By the way, feel free to go back to your statement any time you desire.

Mr. SPEISER. I think the answer to your question is, that you probably can't take on the executive alone without taking on other branches as well, including the legislative and including private organizations as well. The reason for that is that for Federal employees the Bureau of Personnel Investigations conducts an investigation of each employee. The investigators vary in their intensity and scope, but the Bureau has a file on every Federal employee. It relies on information in those files on the various agencies including the House Internal Security Committee.

Mr. WALDIE. Is that the Bureau of Personnel Investigation?

Mr. SPEISER. Of the Civil Service Commission.

Mr. WALDIE. We have the head of that Bureau who will be here tomorrow.

Mr. SPEISER. If I say anything wrong of the functions of the Bureau I trust he will correct me. I am interested in knowing if what I am saying is incorrect. I believe I am correct. I have been involved with the Bureau for the past few years.

Incidentally, I might say the retired Director of the Bureau. Mr. Kimbell Johnson, I found in many cases to be a sensitive person aware of the civil liberties problems. In many ways he felt, however, that what he could do and couldn't do was circumscribed

by the responsibility that he felt existed under Executive orders, and the function that his Bureau was to perform. So I am not suggesting that the Bureau is composed of malevolent men. I don't mean to imply that. The way they operate is this: first of all every employee is subject to a suitability investigation. They must be suitable for Federal employment. In terms of whether they are suitable for Federal employment, the Bureau does not feel it is restricted to consideration of how they will do on the job, but feel they can go into broader areas as well. It includes the right, they feel, of investigating the sexual conduct or misconduct of Federal employees past or present.

Mr. WALDIE. In these various areas involving suitability, is there a statutory standard that they purport to follow? Is it a precedent of some sort, or what is the basis of this authority to determine that the sexual liberties of an employee, for example, bear on his suitability?

Mr. SPEISER. There is no statutory standard. There is nothing in the statutes that authorizes anyone to go into that other than the broad general standard of "promoting the efficiency of the service;" that is also the criterion for denying Federal employment, or the criterion for dismissing employees from the Federal employment—"promoting the efficiency of the service."

Mr. WALDIE. Is this a statutory standard?

Mr. SPEISER. I believe so. I believe it is a standard set up in the Lloyd-LaFollette Act which created the Federal civil service.

There has been a statement of policy that was issued by a former Chairman of the Civil Service Commission, John Macy, in a letter in 1966 to the Mattachine Society, an organization designed to protect the rights of homosexuals and which has battled with the Civil Service Commission as to whether homosexuality should be a basis for disqualification of Government Employees or firing. The letter of Mr. Macy has indicated that the Commission was not interested in the private sex lives of individuals. However, the problem is that when that becomes a matter of public knowledge, then it raises concern to the Commission. It is not on the basis that the individual's ability to do the job has been challenged, but, I believe the theory of Mr. Macy was, that it would affect the public's confidence or faith in the Civil Service if they knew that Federal employees were either homosexuals or were engaged in what was conceived to be immoral activities.

What is public knowledge is a matter of debate. The Commission does not feel it requires printing in a newspaper, headlines, but if a neighbor knows about it, that may be a sufficient basis for investigation. Indeed, there have been cases where anonymous letters have been sent to the Commission.

Maybe you are aware of case involving a Mr. Carter who was a clerk for the FBI. An anonymous letter was sent to the FBI. On the basis of that letter, Carter was called in to find out whether it was true "he was playing around with girls." I think was the phrase. It developed that through this interrogation it was revealed that his fiancée had stayed overnight at his apartment. He had two male room mates. They all agreed that no improper sexual activity occur-

red or any sexual activity occurred, and yet the FBI fired Mr. Carter. They also forced out his two room mates for not having reported him. The Government put in its briefs and oral argument that it is necessary to maintain the moral standards of "a little old lady from Dubuque." The argument being that unless that standard was satisfied, that people would not provide information to the FBI on which it relied to perform its functions.

I know, Mr. Hogan, that you had worked for the FBI on this.

The case ended with Mr. Carter having the discharge erased. He did not desire to go back to the FBI.

I have a recent case which I mention in the testimony which shows times have not changed. I have a client who is a special agent, and he is being subject to a termination proceeding, and one of the charges against him contends that he was deceitful, lack of integrity, and insubordination, and the basis for that— you will see in my testimony the exact question that was posed to him on page 7. One of the reasons for his discharge:

At the time you were interviewed as an applicant for the position of Special Agent, you were specifically asked: "Is there any incident, including arrests or traffic violations other than parking tickets, or information concerning the applicant himself, or a relative, which might tend to reflect unfavorably upon the applicant's reputation, morals, character, ability or loyalty to the United States which the applicant wishes to explain?" and (you) answered No. The obvious intent of this question is to determine any character of moral defects which might have a bearing on the selection process. Your failure to disclose the extra-marital affair you engaged in . . .

During the period which preceded the time he applied with the FBI:

Was deceitful and reflects a lack of integrity.

That is one of the charges at the present time. I think the Bureau has indicated it might back off on that.

It is that type of thing that affects government agencies, and it is not the Bureau alone. There are a number of Federal employees, and I refer to a number of cases in which, again, the investigators have gone around to determine whether or not two individuals, who are not married to each other, were living together and engaged in sexual conduct, and that comes under the criterion of suitability of Federal employment. Even if it is decided in favor of the individual, does not end the matter. This gets to your initial question, Mr. Chairman. Even if any decision is made that is favorable to the employee, that the Government is satisfied that the individual should not be disqualified or should not be fired, the information is still forwarded to the employing agency for that employing agency to make its own determination whether or not that individual is suitable for Federal employment.

In other words, even though there is a general standard of suitability for Federal employment and the Civil Service Commission takes that up under the Bureau of Personnel Investigation and a determination is made that the individual is suitable for Federal employment, if in fact a favorable determination is made, that information is still forwarded to the employing agency for that agency to determine whether or not it wants to do anything with that employee. That is particularly important and dangerous for the employee dur-

ing the probation period because during the probation period the employee has no rights, and if the agency decides it does not want to keep him on a permanent basis, it doesn't have to and need not disclose the reasons for doing so.

Mr. WALDIE. By the way, if members of the committee wish to interrupt with specific questions I am sure Mr. Speiser will not object.

I think the code section brings this into its proper perspective. Section 3301 of the United States Code of the Civil Service, title V:

The President may: (1) Prescribe such regulations for the admission of individuals into the executive branch as will best promote the efficiency of that service.

(2) Ascertain the fitness of an applicant as to age, health, character, knowledge, and ability for the employment.

I presume those general standards are the standards within which the specifics you have just described are to be found.

Mr. SPEISER. That is right, and the question of character has come up in many ways. For example, in order to become a citizen of the United States a person has had to be a person of good moral character for the preceding 5 years. There have been a number of cases involving the question of whether a person is of good moral character if in fact he has had any sexual relations outside of marital relations during that period of time. There have been a number of court decisions which have held that even though an individual had engaged in some other type of sexual activity during that 5-year period, that did not mean he lacked good moral character during that period of time. In spite of that you will find a different interpretation or definition for the Government employees under the guise of determining suitability and determining whether or not they satisfy the character requirement which is a rather broad one as you have indicated.

You will find nowhere in the statute enacted by Congress authorizing the Civil Service Commission or any agency to look into the sexual conduct of individuals in determining whether they have a character for Federal employment.

Mr. WALDIE. May I ask one question? The Bureau of Personnel Investigation, I presume, has a body of precedents that one might have reference to in determining their standards. Is that wrong?

Mr. SPEISER. That is a logical presumption but an erroneous conclusion. There is no way that you can find out what decisions have been made by the Bureau of Personnel Investigation.

Mr. WALDIE. Why?

Mr. SPEISER. Simply because it is not available, and I doubt whether they even know themselves. They do not have categorized decisions that they have made in a body of law or administrative law.

Mr. WALDIE. Then I was about to go another step which I suspect I cannot now go to. I was going to suggest that the Bureau of Personnel Investigation may have a standard but that each agency apparently has a different standard; the FBI, for example, having a much more rigorous standard apparently as to what is for the good of the service than the——

Mr. SPEISER. Than the Veterans Administration?

Mr. WALDIE. Than the Veterans Administration.

Mr. SPEISER. You are right. The agencies do have different standards which is the justification that the Bureau of Personnel Investigation uses for forwarding the information on to the different agencies.

Mr. WALDIE. Now, you say the agencies have different standards and I gather that's so, but what are those standards that cause you to conclude they are different? Is there a benchmark from which we can then determine these standards are different than these other standards?

Mr. SPEISER. Well, I can't recall any cases in which the information has been forwarded on to the agencies to make their own determinations of suitability and, in general, where the Bureau of Personnel Investigations forwarded the information on and determined the individual to be suitable but the agencies have made adverse determinations.

But the argument of the Bureau in forwarding the information on is because the agencies are entitled to have different standards. If, in fact, they have no different standards than the Bureau, then what is the justification for forwarding the information on to the different agencies where we don't know what the controls are they have for maintaining that information as confidential. The information is filled with gossip and innuendo and not hard facts and there is no control by the Civil Service Commission, which presumably has more concern and more expertise in maintaining the confidentiality of that information than other agencies to which it sends it, whether it is the Department of Agriculture or Veterans' Administration or HEW or whatever.

Mr. WALDIE. Mr. Hogan?

Mr. HOGAN. I went to a number of hearings on this proposal in the last Congress and witnesses would come before the committee and list horror stories about invasion of privacy and so forth, I must say, most of them going back many, many years. We asked for substantiating current information. It was never forthcoming. But there have been many horror stories brought before us which are not covered by the proposed legislation. In skimming your statement about Mr. Wentworth, it does not appear that would be prohibited by this legislation. That would not in any way be stopped by the bill that we have before us.

Beyond that, it seems to me that in some instances inquiry into sexual activities might be appropriate. For example, wouldn't the Government be justified in trying to determine whether or not an applicant for the position of guard at the National Training School for Boys is a homosexual or not, or any prison guard? Wouldn't it be an appropriate inquiry to determine whether or not a homosexual was applying for a position as a prison guard, with homosexuality being such a serious problem in prisons?

Mr. SPEISER. There may be situations where there are. I am not prepared to say that that would be a relevant consideration because an individual, merely because he is a homosexual, doesn't necessarily mean that he is interested in sexual relations with young boys at the National Training School for Boys. There is a wide range of interest of homosexuals, as there are with heterosexuals.

Mr. HOGAN. Wouldn't it be a logical assumption on the part of the Government that they wouldn't want to hire homosexuals at all-male institutions?

Mr. WALDIE. Or heterosexuals working at all-female institutions?

Mr. HOGAN. Perhaps, or guarding female inmates with male guards. Yes; I would say in that situation it would be equally logical to inquire into the sexual activity of the applicants.

Now, I deplore as much as you excluding the homosexual from any job in a clerical capacity or any other kind where it is not pertinent. But it is sometimes pertinent. You may recall a case of the two CIA employees who defected to the Soviets after they were brought under pressure when the Soviets discovered their homosexual activity. They defected and actually moved to the Soviet Union.

Mr. SPEISER. Well, one answer to that, of course, is to remove the penalties for being a homosexual, and that very issue is being litigated now. A number of cases that the ACLU is involved with are up before the court of appeals in which the individuals had security clearances denied. Judge Pratt, who is considered a rather tough judge, determined that there was no showing that their open and avowed homosexual inclinations had any bearing on their being security risks, and the Government has appealed those cases. There are three of them that have gone up at the same time.

So the issue that you had in that case, Mitchell and Martin I seem to recall as the names, was the fact that their fear of the disclosure of their homosexuality, including one of them going to a psychiatrist for a period of time for treatment, made them fear that they would lose their jobs if it became known.

The answer to that would be to eliminate the disqualification for homosexuality for getting a security clearance.

Mr. HOGAN. I have made a statement at these hearings in the past that I represent a great many Government employees by the nature of my district, and probably 90 percent of the people who come to me for help in solving problems are Government employees; but in the years I have been in Congress, not one employee has ever come complaining about invasion of privacy. But then, I got a case 2 years ago where a man and woman came to me and they were being harrassed over several years with totally unwarranted inquiry into their relationship with each other. I brought this case to the attention of Congressman Hanley of New York who was the chairman of the subcommittee. Both of us met several times with the people.

We talked to the agency involved and got the situation resolved. I was shocked by the unwarranted probing by overzealous investigators into the private lives of these two Government employees and I think anyone knowing the details would be offended that their privacy was so invaded.

But the point is, that this legislation would not at all prohibit that, that is the problem. This occurred because of the overzealousness of individuals who went beyond where they should have gone. I then reread the legislation and it would not approach this problem whatsoever; and I suspect that is true with many of the things that you have cited here.

Mr. SPEISER. Well, I cited the *Wentworth* case because that in-

volved the security clearance, but I do not see why it would not apply if we are talking about Government employment and not just the security clearance. If you want to amend the legislation to cover security clearance as well, that would be a way of handling that. But I do not see why, Mr. Hogan, that it would not prohibit voyeuristic interrogation by investigators of Government employees as they have in the past to get at details that have no relationship to their job and to have these interrogations involving their sexual lives. It seems to me the legislation does that. Maybe I am misreading it.

Mr. HOGAN. Well, I've just gotten a copy of the bill in front of me now, but I recall at the time I was so shocked by this situation that I went and reread the bill. I said maybe I have been wrong in saying there is no need for this legislation. I then reread the bill and said there's still no need for it because it does not cover these kinds of situations.

Mr. WALDIE. Then we ought to amend the legislation to cover this kind of situation.

Mr. SPEISER. I think that is the answer. If it doesn't, it should, and my recollection is it does. I know that there have been some changes made since the original bill was introduced by Senator Ervin. This is basically Mr. Wilson's bill.

Mr. WILSON. Yes. Do you know, Mr. Speiser, whether since the new administration of the FBI they let the agencies know—

Mr. SPEISER. I do not know.

Mr. WILSON. It would be rather interesting, I suppose, if Members of Congress had to fill out similar applications before they were eligible to run for office, and yet we have access to the top secret, classified, and confidential documents.

Mr. SPEISER. That reminds me of an even broader question that is on the application, I believe, for permanent residence in this country, in which the individual is asked, "Have you ever committed any act that was a violation of law for which you were not arrested?" And that was an improved form of the question, because originally the form of it was, "Have you ever committed any act that was a violation of any law, ordinance, or regulation for which you were not arrested?"

Mr. WILSON. I think Mr. Waldie made the proper suggestion that if there is some way—and that is the purpose of holding hearings on these bills—of improving the bill by amending it we should do it.

I notice on page 19 where you talk about the exclusion of agencies—again, I am interested in knowing to what extent these agencies should be excluded—it is your opinion, apparently, that it is not necessary to exclude the three agencies completely if we establish some guidelines where the national security will be protected. Therefore, is it your opinion that it is not necessary to exclude all—and I agree with you—of the employees in these agencies?

Mr. SPEISER. Yes, it is not just a question of invasion of privacy. I think it is a broader question than that. For example, in this one case I mentioned of the FBI special agent, the question comes up as to what are his procedural rights in the termination proceedings, I find that the FBI is excluded from the regular procedural rights that he would have as an employee of the Department of Justice. The De-

partment of Justice is one of nine Federal agencies that provides for pretermination hearings before an employee is fired. The FBI not only is excluded from that provision, but it does not provide any hearing at all within the agency. There is perhaps an ultimate hearing before the Civil Service Commission after the discharge takes place, but there is no justification, it seems to me, why those procedural rights should not be granted to FBI special agents or any employees of the FBI.

It is just as spelled out here, the feeling that the Bureau is sacrosanct, that it is a law unto itself. The way you determine whether someone should be fired is to give him a fair hearing so if, in fact, he should be fired, everybody is satisfied with the result. But that exclusion in your bill is the same type of exclusion that goes automatically into most legislation that affects Federal agencies. For some reason, these three, the CIA, the National Security Agency and the FBI are excluded; and I do not see the justification for it.

Mr. WILSON. Do you feel that you could assist us in specific language?

Mr. SPEISER. I will try to.

Mr. WILSON. I would appreciate it if you would submit your ideas to me, Mr. Waldie, or the staff. It would be appreciated very much.

Mr. SPEISER. I will try to, certainly.

Mr. WILSON. Thank you, Mr. Chairman.

Mr. WALDIE. Mr. Hillis?

Mr. HILLIS. I do not believe I have any questions at this time. I found your testimony here to be very interesting and enlightening and I will certainly read your statement in careful detail when time permits.

I see that you are in agreement that certain things have to be done to establish the boundaries of invasion of privacy, such as psychological testing. You agree in certain positions that testing is necessary, as long as we do not go into, say, areas that we recognize an employee should have privacy in.

Mr. SPEISER. Yes; I guess I would draw two lines. One is that psychological testing should not be used for job qualification or disqualification simply because I don't think that enough is known about their validity to establish them; and secondly, that if in fact you are going to use psychological tests, that there are certain areas that they ought to stay out of, such as sex and attitudes on race.

It is true that those who give the tests intend that the information is not broadcast—it is not made available to any agency, but the individual still has that fear if this question is being asked by the Government and there is the apprehensions that arise that they should not be subjected to.

Mr. HILLIS. If files are kept, what is your position toward the employee having the right of access to the information, any information, of a personal nature that is kept about him?

Mr. SPEISER. Well, supposedly, every employee has a right to his official personnel folder and that is a very limited kind of access. You do not have access to whatever information is in the investigative file of either the Bureau of Personnel Investigations or by the Office of Security of whatever particular agency you work for. It is

there I think you will find the greatest horrible examples of innuendo and gossip; and you don't know whether information like that is being utilized at any time in decisions affecting your future career as an employee.

I hate to keep referring to this FBI special agent case, but I ran into there not only the refusal initially, until browbeaten by the court, to let me see what was in his official personnel folder. They denied my client and me access to it until ordered to do so under a court order. There is supposed to be an official personnel folder for every Government employee. However, the FBI created one which had exactly 11 documents in it and contended that was all that individual was entitled to see. Further than that, they would not let me see the FBI Manual of Rules and Regulations which my client was charged with violating, again without stating the justification for it. I don't know what would have happened to the world if I had seen the FBI Manual of Rules and Regulations. I can't conceive my doing anything with it other than trying to defend my client. And finally, after a great rigamarole, the judge had to spend his time—an entire day—reading through the manual to see which parts I could see and which parts I could not see.

And that kind of "close-to-the-chest" aspect is not just unique to the FBI, but I think it is true with other agencies as well. Once you start talking about investigative information you would think, again, the world would come apart if investigative information were made available to the employee about whom it was concerned.

Congress passed the Fair Credit Reporting Act which gives individuals the right to see what information there is in credit agencies about themselves. The justification has always been, as to why they should not, because it would dry up sources of information; and yet you have permitted individuals to see what information there is in credit reporting agencies which has an impact on individuals. I simply do not believe that this fear that is expressed is true that individuals will not give information which they think is valuable, pertinent, and relevant because someone will find out about it. If, in fact, it does dry up gossip and rumor, maybe that is not such a bad thing.

Mr. HILLIS. I think that is all. Thank you, Mr. Chairman.

Mr. WALDIE. Mr. Moakley?

Mr. MOAKLEY. I have no questions.

Mr. WALDIE. Mr. Speiser, have you had any opportunity to examine the role of the House Internal Security Committee providing information to the executive branch? You refer to the Bureau of Personnel Investigation. Is it your understanding that is the only bureau to whom they provide information?

Mr. SPEISER. No; my impression is—and the House Internal Security Committee is quite proud of the fact that it provides information to a wide range of government agencies not just the Bureau of Personnel Investigation of the Civil Service Commission.

Mr. WALDIE. They are not proud enough to testify before this committee as to the extent of how much information they provide. At least thus far they have not been.

Mr. SPEISER. At times they put our statistics in their annual reports, as I recall, in effect praising themselves for the availability of information and the number of agencies that have called on it and looked at their files. It is interesting to note that the Executive order which I think was 9835, which established the loyalty program under President Truman and specifically said that the files to be looked at in determining loyalty of Federal employees was to include the files of the House Un-American Activities Committee—that Executive order was repealed by the adoption of Executive Order 10450 under President Eisenhower, and it specifically repealed Executive Order 9835. There is no provision in Executive Order 10450 that the files of the House Un-American Activities Committee are to be looked at in determining loyalty of government employees.

Mr. WALDIE. Do they require an Executive Order to have access to those files?

Mr. SPEISER. I am not sure. I think that is a debatable legal argument. I would make the argument that where you have a specific Executive Order authority and you have something that takes over and repeals that, that I would argue that is a Presidential intent not to continue to use the files of the House Un-American Activities Committee, now the House Internal Security Committee.

Mr. WALDIE. Now, on those Executive orders, do they apply just to the Bureau of Personnel Investigation?

Mr. SPEISER. I do not believe so. I believe they apply—I believe they apply to the FBI and the intelligence agencies of the military services, I think.

Mr. WALDIE. How does the—I see in reading your statement a number of references to FBI interrogations. How does the FBI come into this situation? Does the Bureau of Personnel Investigation utilize the FBI in making some of their inquiries or all of their inquiries or what?

Mr. SPEISER. I believe so, and I guess the best thing is to pose the question to the Director of the Bureau of Personnel Investigation when they appear. I am not clear in my own mind now as to whether they use FBI in full-field investigations for government employees where they find it is necessary, where they have sufficient information to call for a full—

Mr. WALDIE. For example, the only one that has made any inquiry to be relative to any prospective employee of the executive branch has been an FBI agent who periodically comes up to the office and says the President is considering so and so for such and such, and do you have anything you want to say about him. Now, is that a different sort of inquiry than the Bureau of Personnel Investigation is making?

Mr. SPEISER. I think there are two levels of types of investigations that are made on government employees and at the one level the CSC Bureau of Personnel Investigation uses its own investigators; but then, where they have sufficient what they consider derogatory information to require a full-field investigation, I believe they use FBI agents, and that is done I believe on a contract basis with the FBI. I am not entirely sure.

Mr. WALDIE. Well, we will find that out when we ask the FBI Director.

Mr. SPEISER. You mean the Bureau of Personnel Investigation or are you having the FBI Director?

Mr. WALDIE. We are having the Bureau of Personnel Investigation fellow up tomorrow but we may have to go into the FBI also. I keep finding references to what the FBI has been doing and I still don't understand how the FBI gets into investigating applicants for jobs in other agencies unless the question of security risk is involved. And where do I find, by the way, the standard for security risk? Is that contained within this general "promote the efficiency of the service or character" or are there other statutory requirements saying that a man, for example, who has a—in the belief of the employing agency—element of vulnerability because of his sexual activities, for example, and is therefore a security risk? Is that another code section we are talking about?

Mr. SPEISER. I don't think you will find in the United States Code passed by Congress any reference to the right to investigate sexual practices or activities or conduct of individuals.

Mr. WALDIE. Well, I am just using that as an example. It may be a variety of things. His uncle or his son engaged in antiwar activities, the one example you gave here, and therefore the woman in the State Department was curtailed of what heretofore had been her prerogatives for travel. Do you recall that incident?

Mr. SPEISER. Yes.

Mr. WALDIE. Now, I presume that the finding there was that she was a security risk because her son was engaged in antiwar activities and therefore she should not have as broad rights to travel on behalf of the State Department as had been the case prior to that.

Mr. SPEISER. In many cases, you don't find decisions—you don't find a label that someone is stamped a security risk. You will just find nonaction or nonapproval or something of that kind.

Mr. WALDIE. But I am looking under this code section or should I forget it as a lawyer and try to find a basis for action?

Mr. SPEISER. As a lawyer, you are not going to find what you are looking for set out in the United States Code in granting authority to any agency to do what they are doing, but you will find it in perhaps in regulations, but often you won't find it spelled out in regulations other than under a very broad rubric as to whether the individual is engaged in notoriously disgraceful or immoral conduct.

Mr. WALDIE. When you are successful in finding or having a person that is willing to come forward—I think Mr. Hogan's concern that not many people have complained to him is understandable—I doubt many people who complain that they are being asked the sort of questions that are revealed in your statement. They would rather let a messy barrel be covered rather than stir. But when you do find someone who is willing to come forward, you then go to court and I presume you rely upon some code section that they had exceeded their authority; or am I being too orderly in my approach to this problem?

Mr. SPEISER. You are being too orderly. You will not find code

sections that spell out the right of Government to do as they did in order to challenge it.

Mr. WALDIE. So this is clearly a field then that is not a government of law that we are dealing with here and that is our problem, I presume. We should reduce this to a field of law so that the actions are governed by law rather than by the individual, which is the problem.

Mr. SPEISER. That is right. For example, the sort of change in the policy of the Civil Service Commission as enunciated by that letter by Chairman John Macy to the Mattachine Society, was supposedly a fundamental change as to what the CSC scope of investigation was into sexual matters. It was done without any change of law. It was done by a letter by the Chairman. A subsequent Chairman can ignore the letter. A subsequent Chairman can write a new letter. Congress does not have any role in this or has not had any role in this.

Mr. WILSON. Mr. Chairman, I received a copy of the letter addressed to you by Mr. Ichord, the chairman of the Internal Security Committee, which I assume the other members of the subcommittee have received. I am not acquainted with the letter that you addressed to him, but I gathered from his letter that he is challenging the authority of this committee to hold hearings on this subject matter.

Mr. WALDIE. I don't know. I have not seen the letter. I have been out of town.

Mr. WILSON. In fact, he asked you a series of questions.

Mr. WALDIE. We will put the letter in the record.

Mr. WILSON. What did you write to him?

Mr. WALDIE. I wrote and asked him to appear and tell us all about his little operation up there and what's in the files and what sort of cooperation he gives the executive branch and what service he rendered the country. I did not write it that bluntly but it was roughly what I was seeking to find out, or discover, if the case may show itself. But it does seem to me if we are complaining about abuse of power on the executive branch—and I am and many of us have been—that we ought to clean up our own house if cleaning up is warranted, and if there are no controls on the part of those files, then we ought to examine why there are no controls. We don't even know what's in the files. We have no idea of the content—I have an idea but we don't know what standards involve how material gets into the files and we have no apparent standards as to how that information is disseminated and apparently no Federal employee has access to his file compiled by the House Internal Security Committee. So it does seem to me that if that is the case—and it may not be—then if it is the case, in this legislation we perhaps ought to apply some language that applies to that access to the House Internal Security Committee files also on the part of executive agencies involving a Federal employee.

I would presume, without knowing much more than I know now, that this legislation has the ability to control access to those files by Federal agencies. If no one requests them, they can continue clipping and gathering and accumulating up there and they can have a great time doing that, but if a Federal Government executive branch does not seek that information—is prohibited by law from seeking that

information, that may in some respects protect those, if in fact people are wrongfully damaged and injured by them. And I don't know that's the case but perhaps we can find out if the chairman is willing to appear. Where is the letter? Do you have it?

Mr. WILSON. I should have brought my copy. I fouled up my office routine. I came in Saturday and opened all the mail that was there and I don't know whether we can even find it now.

Mr. WALDIE. Are there any other questions?

Mr. HOGAN. No, thank you, Mr. Chairman.

Mr. WALDIE. Mr. Speiser, do you have anything in addition you would like to present to the committee? I think we have pretty well exhausted you on the subject.

Mr. SPEISER. No. I don't believe that it would be worthwhile for me to read each and every word that I have in my statement. As you indicated, it is going into the hearing record.

I testified on this bill first, I guess, in 1966 before Senator Ervin's committee and I looked back in my old testimony and I found a paragraph in there that I would like to leave with the committee. I am sure that most of you have heard it but it has great applicability not only to the bill that the committee is holding hearings on but I think to another problem on the American scene. It's a sentence by Justice Brandeis in *Olmsted v. United States* in 1928 which involved wire-tapping. He said:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachments by men of zeal, well-meaning but without understanding.

Mr. WALDIE. Thank you, Mr. Speiser. Any further questions?

Mr. WILSON. No.

Mr. WALDIE. Our next witness will be Mr. Scott Walters, an attorney from Atlanta, Ga.

Mr. SPEISER. Excuse me, Mr. Chairman. I have a recent ACLU report that I would like to add, called "The Lie Detector as a Surveillance Device," which has just been produced, and I would like to request that it be included in the hearing record.

Mr. WALDIE. Please leave it with us.

[The report was retained in the files of the subcommittee.]

Mr. WALDIE. Mr. Walters, do you have a statement here?

Mr. WALTERS. No, sir, I do not have a statement.

Mr. WALDIE. All right. Then you please proceed as you will.

STATEMENT OF SCOTT WALTERS, ATTORNEY, ATLANTA, GA.

Mr. WALTERS. Mr. Chairman, gentlemen, I am a practicing attorney, a general practitioner in a one-man office, and have been such for about 23 years. During this time I represented roughly a hundred civil service cases, primarily at the lower echelon, with one or two of them in Federal Court.

I want to address myself to a specific problem and I have purposely avoided examining the bill that is before you because I am concerned as a lawyer not with what this bill is but what the problem is, and what we need protection on.

For example, Mr. Hogan pointed out this bill does not cure everything. No; but if it is a step toward protecting the right of privacy of an individual it is a good bill. Certainly, I would like to see more and some of what I have to present is more, and if the bill gets strengthened by that I would appreciate it.

My personal political philosophy is that of a conservative Republican. It does not always come out that way in practice though because when a problem comes up there should be a remedy. We have in the civil service retirement procedure a disability retirement which can be physical or can be mental. I am directing myself primarily to the mental retirement. This is a realm where no person can get a lawyer because a lawyer helps him none.

Basically, the present procedure provides for a file which is prepared at the agency level. It is incomplete in that the only thing you can put in is what you want, but the conclusions come out of the agency. There is no ability on the part of the individual to challenge anything that goes into it. There is no responsibility and no accountability on the part of anyone to put something in it whether it be an opinion or a statement, and then when it is prepared it is supposedly restricted in its distribution, but this does not occur either. The civil service regulations provide that it cannot be furnished to anyone other than a duly licensed physician of the employee or retiree selection, but as a matter of practice, what this means is that if he signs a medical authorization—and there is a particular case that I worked on where the gentleman pointed this out to me.

He was sent into the medical department where he worked and they had him sign a routine medical authorization. The doctor told him, "Don't worry about it. Go ahead and sign it. They don't give sensitive information on this sort of request." He signed it. Someone, on the company's letterhead, signed the doctor's name—apparently his secretary. The doctor called it a forgery but it was initialed, and I don't really think it was a forgery. I think it was an administrative thing handled by a secretary. It was forwarded. The medical department of that corporation received the full sensitive information that was so sensitive, in the opinion of the Civil Service Commission, that the man couldn't have it himself because it was a threat to his well-being.

So, to me, this type file should contain not only the investigation on which the gentleman was retired, but it should also include all available medical information regardless of where it comes from, particularly the Veterans' Administration and collateral Government agencies. It should be added to as other information is available and then in the handling of the file I feel that the employee should be allowed—and I don't see any reason that he should not be allowed—to have access to the file on everything except the medical opinions.

When we are dealing with mental disability, we are dealing almost entirely with lay testimony. The man should be allowed to see it and he should be furnished with a copy of it. He should be allowed to refute it. He should be allowed to submit other lay testimony in contradiction of it and when this is completed, then the file—I will go one step further—I won't stop there—as to the medical information, I don't think that should be denied him unless his own personal

physician says that it is a threat to his well-being for him to have it. Certainly a regulation should not be what keeps him from having it.

Carrying it a step further, I feel that in order to make sure that this type action is predicated on something worthwhile, the person making the statement to go in that file should be responsible for what he says. What I mean by that is that the statements should be made under oath. They should be under penalty of perjury and I suggest as to this—and as to the other things that you are dealing with on invasion of privacy—it really doesn't give the employee protection to say they can't give out certain information or he can see all the information unless you do two things: One is to provide a penal penalty to cover violation of it; and second is to allow civil liability. The reason I add the second is it has been my experience with the U.S. Government that the FBI can go out and investigate a problem and they can put the package together. They can show that the law has been violated and then when they get through—they are strictly an investigative agency—they present it to the Department of Justice where somebody else determines, not whether the law has been broken, but whether there should be a prosecution. This is a recurring thing over and over again and the Department of Justice is the sole person to decide whether there be a prosecution.

Therefore, making it a criminal offense to pass out this information or to restrict it or to give false information on it is not sufficient to protect the individual. If the person is held civilly responsible for what he does, then no one has to ask the Attorney General whether he can be sued.

Once the file is completed, I think that, again on this privacy thing—we have got a man retired at this point on the basis of a mental disability—if this information is passed out to anyone other than a medical practitioner treating the man or an institution where he is being cared for, then the whole purpose of the information is being defeated.

For example, an employment application, an insurance investigation relating to an insurance claim these things have nothing whatsoever to do with that file. If a man does not want to employ him he doesn't have to. If the insurance adjustor wants to deny his claim he can deny it. If the individual employee or retiree is furnished all the information that is in that file except such information as his personal treating physician says he should not have, then he can present them with what he wants them to have. If he doesn't want them to have it then that's his business.

I think in approaching it this way in this type situation, we give a man the protection that he is entitled to.

Now, what actually happens is that when this sort of information is requested from the Civil Service Commission, they sent out—first, it has to come with the medical department form; they don't care who the doctor is or what his purpose is as long as he signs it; then they send a little letter with it that's got a paragraph that says, "You are not supposed to pass out this information other than—it is for your own personal use."

Actually, what they do in sending it to a corporation, as occurred in the case that actually brought me here, everybody reads it. Everybody

knows about it. The Civil Service Commission's skirts are clean, though, and that is what to me your problem is. It is not a problem of trying to make sure that we go through forms. It is a problem of substance.

Now, Mr. Wilson mentioned a while ago the question of where do you stop on giving out this sensitive information as far as security is concerned. I say don't let the agency itself pass on this. It is not up to such agency whether the CIA or FBI information is such that if they passed on it it would be a security risk. I have worked all this time on this particular problem and the same thing applies on this medical information. Don't let the Civil Service Commission say that this is information that should or should not be passed out. Let the man's private physician or the institution that he's been committed to determine that.

I feel that any step toward protecting the right of privacy of an individual employee is great. I feel like what we are talking about is something that is really just a very small step, where we have got to take a giant step in a hurry or we are going to be in a lot worse trouble than we are right now.

I think basically that is my entire position on it except that I do feel that this civil penalty, as well as the criminal penalty, is vital to the effectiveness of the legislation at this time.

Mr. WALDIE. Thank you, Mr. Walters.

Mr. WILSON. Mr. Chairman, I want to thank Mr. Walters for his testimony. I agree with him that we should not reject legislation just because it will not solve all of the problems we are trying to solve. But let's start someplace. As you, Mr. Chairman, indicated in your opening remarks, if the legislation protects some area of privacy, it is worthwhile, and then we can always go on from there.

I hope that we are able to get legislation through and we don't have to water it down too much, but if we find this is necessary because of the active lobbying activities of certain agencies of the government, then let's get some type of bill through anyway.

Mr. WALTERS. I will say this on that, Mr. Wilson: If the bill did not threaten somebody, then it would have been passed the first time because nobody would have objected to it.

Mr. WILSON. Thank you.

Mr. WALDIE. Mr. Moakley?

Mr. MOAKLEY. No questions.

Mr. WALDIE. I have no questions, Mr. Walters. I do appreciate your testimony and you have brought before us a very difficult but a sensitive and an important problem. The committee will address it.

Mr. WALTERS. I figure if you solve this one, then the others will come a little easier.

Mr. WALDIE. I am sure they will.

Mr. WILSON. Mr. Chairman, I think it is significant that Mr. Walters indicated he is a conservative Republican. I believe we are getting this type of testimony not only from Mr. Walters but people who represent other political philosophies and I think it demonstrates that there is good reason for this type of legislation.

Mr. WALTERS. Mr. Wilson, I mentioned that because ACLU is the only one that's supposed to be interested in people's rights. I am, too.

Mr. WILSON. Thank you.

Mr. WALDIE. Gentlemen, so that the matter of the request that I made to Mr. Ichord, the chairman of the House Internal Security Committee, should be clarified, on May 3, he was delivered a letter requesting that he attend, and the letter said:

DEAR MR. CHAIRMAN: The Subcommittee on Retirement and Employee Benefits will hold initial hearings on May 14, and 15, into the issue of privacy of Federal employees.

It is our hope that you would be available to testify as to the use of House Internal Security services and files by agencies of the federal government on one of these days, but preferably May 15th.

We would be particularly interested in a description of how files on individuals are compiled by your committee, who has access to those files, and what safeguards are provided to assure that the information contained in the files is accurate, and is disseminated only to those who are authorized to receive such information.

We would also welcome your views on the question of invasion of privacy in general.

If you have any questions, please do not hesitate to call Mr. Donald Terry of the Subcommittee.

On May 8, Mr. Ichord wrote back—it was received on May 11:

DEAR JERRY: I have your letter of May 3, 1973, inviting me to testify before your subcommittee on "Retirement and Employee Benefits." I am writing for further information so that I may ascertain precisely what you have in mind.

As you know, during the recent consideration of this committee's appropriation I had expressed my views regarding the files of this committee, one of the subjects to which you refer. I am of course aware of your personal interest in that matter, but I can see no possible connection between it and "retirement and employee benefits." You are aware that the Bolling Committee is presently undertaking an examination of all committee mandates, procedures, and practices. It is my intention to express my views on that subject to the appropriate committee.

You further suggest that you would "welcome" my views on "the question of invasion of privacy in general." This, as you know, is an extremely broad and open-ended subject upon which one may conduct endless discourse. You have given me no reference as to your specific area of interest. Consequently, I am unable to make a judgment as to the scope of any statement or to the allocation of my time for this purpose.

Would you please provide me with the following information, so that I may make a judgment on the question whether I desire to testify and to what issues I may appropriately address myself:

(1) Let me have a copy of the mandate or resolutions of the full Committee on Post Office and Civil Service setting forth the jurisdiction and scope of authority of your subcommittee on "Retirement and Employee Benefits."

(2) Let me have a copy of the relevant minutes, and resolution or resolutions, which your subcommittee has adopted authorizing the conduct of these inquiries to which you refer.

(3) Please advise me whether you are making these inquiries in connection with bills pending before your subcommittee: what these bills are: and whether you are conducting hearings on these or particular measures with respect to which you seek my views.

I shall await your further advice.

So the chairman has not rejected our request for assistance. He has just asked for additional information which I will provide him.

Mr. WALTERS. Mr. Chairman, may I say something? I have a file on the case that—there was a particular case that got me interested in this subject. I do have a file on it, including the letters back and forth between him and the Civil Service Commission and the Court

of Claims action on it which shows pretty well what can happen to one individual, if this might be of value to the committee.

Mr. WALDIE. Well, it might be. I would leave this up to your judgment. Would you look that file over and submit to us the relevant portions that you believe would assist us without doing harm to your client?

Mr. WALTERS. This is my client here and he has no objection to its being included in its entirety.

Mr. WALDIE. All right. Are those copies?

Mr. WALTERS. These are copies of the Civil Service regulation and the letters and documents that were included with a summary.

Mr. WALDIE. I think that would be very helpful. If you would leave that with the committee I would appreciate that.

There being no further matters, gentlemen, we will convene tomorrow at 10 a.m. and I would hope you can make it on time and we will start out with the Civil Service Commission Bureau on Personnel Investigations.

[Whereupon, at 12:01 p.m., the hearing was adjourned.]



RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

TUESDAY, MAY 15, 1973

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 210, Cannon House Office Building, Hon. Jerome R. Waldie (chairman of the subcommittee) presiding.

Mr. WALDIE. The subcommittee will come to order. The first witness today is Mr. Robert Drummond, who is the Director of the Bureau of Personnel Investigation of the U.S. Civil Service Commission. He is accompanied by Mr. Anthony Mondello, the Commission's General Counsel.

STATEMENT OF ROBERT J. DRUMMOND, DIRECTOR, BUREAU OF PERSONNEL INVESTIGATIONS, U.S. CIVIL SERVICE COMMISSION, ACCOMPANIED BY ANTHONY L. MONDELLO, GENERAL COUNSEL, U.S. CIVIL SERVICE COMMISSION

Mr. DRUMMOND. Mr. Chairman, first I'd like to point out that I have been Director of the Bureau of Personnel Investigations since April 16 of this year. Prior to that, I was Regional Director of the New York Region of the Civil Service Commission for a little over 4 years, and one of the programs coming under my management there was the investigations program for that region.

I started my career with the Civil Service Commission as an investigator in 1952, and left it in 1959, and at that time I was the Assistant Chief of the New York Region investigations division.

I just say this to let you know that my service in the program has not been limited to that since April 16 of this year.

Mr. WALDIE. What was your employment intervening, between 1959 and April 16 of this year?

Mr. DRUMMOND. In 1959, I was a Health Benefits Representative, when the health benefits program was first being implemented. And then in 1960, I was the Administrative Officer of the New York Region.

And in 1961, I came to Washington, and worked in the Executive Director's office.

In 1963, I went to Chicago, and was the Deputy Regional Director of the Chicago Region.

And in 1966, I returned to Washington as Assistant to the Deputy Executive Director.

(55)

And in 1968, I established the first Office of Management Analysis and Audits in the Civil Service Commission, and in 1969 I left for New York to be the Regional Director.

Mr. WALDIE. Okay. Fine, thank you.

Mr. DRUMMOND. Sir, do you wish me to read my statement into the record?

Mr. WALDIE. If you would like. Whatever you would prefer.

Mr. DRUMMOND. First of all, I appreciate the opportunity to submit a statement responsive to the interest expressed in your letter of May 2, 1973, to Chairman Robert E. Hampton concerning the Commission's relationship with the House Internal Security Committee and the use being made of that committee's services, documents and files.

We will be pleased to answer any questions you may wish to ask about this matter.

The Commission has a major responsibility for conducting Federal civilian personnel investigations. In fulfilling that responsibility, we conduct investigations of persons entering the Federal service.

Our investigations include checks of the files of government investigative and intelligence agencies.

Up until the last several years, the Commission searched the files of the then House Committee on Un-American Activities in every case coming under our investigative jurisdiction. Since then, we have had to limit our searches because space limitations and procedural changes at the House Committee on Internal Security (HISC) reduced the number of searches that could be made by Committee personnel on a timely basis.

Mr. WALDIE. What were the procedural changes?

Mr. DRUMMOND. Well, they automated their files, is my understanding, Mr. Chairman.

Mr. WALDIE. Well, the automation of their files makes searches more cumbersome than before?

Mr. DRUMMOND. Yes, we used to submit them on individual cards for a check, and with the automation, we would send up lists of names. This is my understanding.

And at one time there was a backlog of some 8,000 names up there. So we decided to take another look at it in terms of not only timeliness but productivity of the search.

Accordingly, we adopted criteria which provided for searches only of those cases which our experience showed offer the highest potential for obtaining significant lead information.

Thus, we now request searches of the HISC name files on the following: (1) All appointees at GS-12 and above; (2) all other appointees who have attended college since June 1968; (3) all appointees whose cases are referred to the FBI for loyalty investigation and; (4) any other cases in which the examiner concludes that such a search is desirable based on information available.

In fiscal year 1973, this will call for about 20,000 searches out of a total investigative caseload of some 300,000 cases.

Whenever a search of the HISC name files discloses the availability of information on a person with the same name as the person being investigated, the Committee staff identifies the source of the

information. This is usually a published Committee report or hearing. We then refer to a copy of the report or hearing on file in the Commission and extract the information.

Any information thus obtained is strictly leads information. No decision is made on the basis of such information standing alone. If the information in our judgment is immaterial, we ignore it. If it appears to be sufficiently serious to warrant further inquiry to resolve the issue as a preliminary to possible adverse action, further investigation is requested to obtain full facts for an objective decision. All cases involving loyalty questions are referred to the Federal Bureau of Investigation for full field loyalty investigation.

Upon completion of the investigation the reports are reviewed by experienced CSC evaluators in all cases coming under the Commission's jurisdiction. Loyalty issues go to a panel of three experienced, high-level examiners. Before a decision is made, the individual is given the opportunity to explain or rebut the information by means of a personal interview or a letter of interrogatory. He is permitted to be accompanied by a representative of his own choosing. The entire record is then considered, and only the Civil Service Commissioners may order a separation based on reasonable doubt as to a person's loyalty to the United States.

Similarly, suitability questions that may be disqualifying must be fully resolved through personal investigation by Civil Service investigators. The same right of opportunity to answer the charges is afforded, after which the decision is made by experienced evaluators.

In cases in which the Commission does not take jurisdiction (excepted service and sensitive positions) we furnish the completed reports of investigation to the employing agencies, which are expected to invoke the same safeguards to individual rights as the Commission does.

In conducting investigations and deciding on fitness for employment, the Commission's concern throughout is to protect the legitimate interests of the Government without incurring needlessly upon the rights of the individual. We therefore strive constantly to arrive at equitable decisions based on established facts, not on raw data, hearsay, suspicions, or unfounded allegations.

Mr. WALDIE. What is there about people who have attended college since June 1968 that leads you to believe that there is the highest potential that their names could be found in the HISC files?

Mr. DRUMMOND. Well, first of all, sir, there are several reasons for, No. 1, checking college graduates, and then, No. 2, the period around 1968.

This was a period of time when campus unrest was at its height, when organizations were springing up, some of which were alleged to be subversive.

Mr. WALDIE. By whom? What organizations?

Mr. DRUMMOND. Well, for example, sir, the Students for a Democratic Society.

Mr. WALDIE. Is that a subversive organization?

Mr. DRUMMOND. It has not been designated as a subversive organization.

Mr. WALDIE. Well, if a prospective employee is found to have belonged to SDS, is he thereby eliminated from the prospect of employment?

Mr. DRUMMOND. No, sir, membership in any organization is not a disqualifying factor, per se.

Mr. WALDIE. Well, then, why do you even bring up SDS as an alleged disloyal organization?

Mr. DRUMMOND. I don't think I characterized it as an alleged disloyal organization.

Mr. WALDIE. What did you characterize it as?

Mr. DRUMMOND. I say it is a questionable organization.

Mr. WALDIE. Questionable in what regard?

Mr. DRUMMOND. In terms of the aims of the organization.

Mr. WALDIE. You mean in terms of the loyalty of the organization?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. All right. Questionable in terms of its loyalty to this country?

Mr. DRUMMOND. Questionable in terms of whether or not such an organization is—I don't like to say loyal.

Mr. WALDIE. Oh, come on. Let's not play games here. That's what you believe, don't you? That the SDS is a disloyal organization, and a suspect organization? And that is why, since 1968, any one who graduated from college must be shown not to have belonged to these suspect organizations?

Mr. DRUMMOND. No; I said that membership in an organization, per se, is not disqualifying, sir.

Mr. WALDIE. Well then, why did you mention SDS as having any bearing on any decision? Mr. Mondello? Perhaps you should answer.

Mr. MONDELLO. I think at the time this decision was made—

Mr. WALDIE. What decision?

Mr. MONDELLO. The decision to focus on all appointees who had attended college since 1968.

Mr. WALDIE. I assume it was probably sometime in 1968. Do you know?

Mr. DRUMMOND. No.

Mr. MONDELLO. I don't know the answer. I can determine it.

Mr. DRUMMOND. The decision was made in 1971.

Mr. MONDELLO. I think it's important to understand that you don't have to designate an organization as being anything by way of characterization—subversive or anything else—or disloyal, for example.

Frankly, those are words of great generality, and I am not too sure, on occasion, what they mean.

I think the concern, probably, by the predecessor to Mr. Drummond was with the Weathermen faction of SDS, which had a reputation for putting bricks through windows during the Martin Luther King parade in Memphis, tearing up department stores, and things of that sort, that did hit the newspapers.

You talk about allegations of subversiveness. I don't know that the newspapers were pointing to SDS or the Weatherman faction and saying they are subversive, but we are concerned with the quality of personnel who do work for the Federal Government. We like to believe that they are relatively law abiding.

Mr. WALDIE. Okay. That's another standard. I am trying to get at the standards by which you judge people.

They must be relatively law abiding? Is that a standard? If so—it's a standard you just recited—where is it found?

Mr. MONDELLO. Let me see if I can show you that.

Mr. WALDIE. Relatively law abiding.

Mr. MONDELLO. The suitability standards—

Mr. WALDIE. I know the suitability standards. Is relatively law abiding part of the suitability standards?

Mr. MONDELLO. I would have to say "Yes."

Mr. WALDIE. Well—have to? Not have to. Is it part of the suitability standards?

Mr. MONDELLO. I think it is embraced in, I guess it's 5 CFR 731.201(b), which discusses criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

The word "criminal" would seem to embrace the fellow who pushes on somebody else's Constitutional rights, or throws bricks through department store windows, whatever the nature of the criminal activity, be it a misdemeanor or a felony, I would assume.

Mr. WALDIE. It is your assumption that college graduates since 1968 are more prone toward relatively law abiding conduct than those prior?

Mr. MONDELLO. No; I think you are putting words in my mouth.

Mr. WALDIE. I am not putting words in anybody's mouth. Why are searches only done on appointees who have attended college since June 1968? Is there an assumption that college since June 1968 is more likely to produce a relatively—a less relatively law abiding employee?

Mr. MONDELLO. Apparently the judgment of the Director of the Personnel Investigations Bureau of the Commission at whatever time that determination was made was that in cases—and I assume this is based on his experience with real cases—was that in cases where they had made searches of the other committee's files, that they had developed information which was significant, in the sense that they wanted to look further to conduct investigations. And if that was their judgment, that was their judgment.

Mr. WALDIE. Well, that is still your judgment, is it not? These are the criteria by which you have reference to these files now? You don't look at anybody who hasn't attended college since June 1968?

Mr. MONDELLO. Well, I don't have a personal judgment on that.

Mr. WALDIE. I am talking about the statement of Mr. Drummond. He says, "We now request searches of the HISC files on the following: . . . (2) All other appointees who have attended college since June 1968."

That's the policy of the Commission, is that right, Mr. Drummond?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. And the reason for that is because it is assumed that appointees who have attended college since June 1968 are more likely to be unsuitable?

Mr. DRUMMOND. Not the sole reason, sir, because, if you read—

Mr. WALDIE. I know there are others, but is that one of the reasons?

Mr. DRUMMOND. If you will let me explain.

The first category is all appointees at grade 12 and above.

The second category covers appointees who have attended college since June 1968; we have a large college intake program in the Federal Service from our Federal Service entrance examination. These appointments are made at grades 5 and 7.

These appointments are to positions that do lead to policymaking and upper level management positions, because it's the cream of the crop.

So if you just use the first category, you would eliminate a search on these. And we think a search on these is essential, not just of the House Internal Security Committee file, but any file which may furnish us possible leads to assist us in these investigations.

Mr. WALDIE. Now, tell me, on your criteria two, I presume that, as counsel says, the reason you have established that is because you found a great number of people that graduated since 1968 who are of questionable standards, whether it be loyalty or relatively unlaw-abiding?

What has been the history?

Mr. DRUMMOND. I don't think we could say we found a great number of people.

Mr. WALDIE. I thought that counsel thought that was the case.

Mr. MONDELLO. I didn't mean to suggest that. I don't know what the number was. But it wouldn't have to be a great number.

Mr. WALDIE. What was the number?

Mr. MONDELLO. I don't know the answer.

Mr. DRUMMOND. No; I don't, sir.

Mr. WALDIE. Can you provide that?

Mr. DRUMMOND. I will do my best to provide it.

Mr. WALDIE. Would it be difficult?

Mr. DRUMMOND. It may be difficult, because we keep no individual records, sir, but I think perhaps I may be able to get you some statistics on the productivity of the search.

Mr. WALDIE. Why do you keep no individual records? You mean from that that if an appointee is disqualified because he has something in his files, you keep no record of that fact?

Mr. DRUMMOND. We have a record of that, but we don't keep it separate from any other records.

Mr. WALDIE. Where are those records?

Mr. DRUMMOND. There'd be a notation on an index card. If there was an investigation conducted in connection with it, I mean a personal investigation, there would be a report of that investigation.

And in the case of somebody who was either denied employment or removed from employment on that basis, there would be some sort of a file, but it wouldn't be kept in a separate place. It would be filed with all of the other cases.

Mr. WALDIE. Well, do you have a computer capacity of retrieving those cases?

Mr. DRUMMOND. We have no computer. Our files aren't computerized.

Mr. WALDIE. Do you have any capacity of retrieving this information? Can you provide me with the information I have asked for—

how many appointees who attended college since June 1968 have been found in the HISC files?

Mr. DRUMMOND. I am not positive that I can, Mr. Chairman, but I will ascertain whether or not it is at all possible.

Mr. WALDIE. Can you tell me how many cases you have submitted, names you have submitted to the committee during this past year?

Mr. DRUMMOND. During the past year, I would estimate that—well, in my statement it says we will make about 20,000 searches during the fiscal year.

Mr. WALDIE. 20,000 names, would that be?

Mr. DRUMMOND. That would be 20,000 names out of an investigative caseload of approximately 300,000 cases.

Mr. WALDIE. That will be referred to HISC?

Mr. DRUMMOND. Yes, will be checked through HISC. This is purely an estimate in terms of our investigative requirements.

Mr. WALDIE. Now, I'd be interested in knowing, of the 20,000—and the only way we will find out is by last year—was it roughly 20,000 last year, too?

Mr. DRUMMOND. It would approximate that, sir.

Mr. WALDIE. Of the 20,000 last fiscal year submitted to HISC, please tell me how many individuals you received derogatory information on from the HISC files? Can you provide that to me?

You are nodding your head?

Mr. DRUMMOND. I am not sure.

Mr. MONDELLO. I doubt we could.

Mr. WALDIE. Why not?

Mr. MONDELLO. For one thing, I don't know what you mean by derogatory.

Mr. WALDIE. Let me say this. First, let me know, of the 20,000 names you refer to HISC, how many of those names were found in the HISC files. You surely know that, don't you?

Mr. MONDELLO. The difficulty is, we are embarked on a course of investigation in order to determine the full background and qualifications and fitness of people who are to be hired. We probably get requests for about 300,000 or so investigations of all types a year, on the average, and some of them are filtered out on the basis of the policies Mr. Drummond has been talking about; and we make some requests of the Internal Security Committee's files.

Mr. WALDIE. We are still down to 20,000 requests?

Mr. MONDELLO. Right. And out of those 20,000, the question is what pieces of paper do you get back? I am perfectly willing to give you whatever we have, on the results of the breakdown of the 20,000.

It's going to take an awful lot of clerical work to do that, however, and I am trying to discover right here what we get back from the Committee, so we can ferret out just what happened.

If we can do it, we will do it for you. No problem.

Mr. WALDIE. I am trying to discover that. Let's explore it. What do you get?

Mr. DRUMMOND. First of all, what we normally get from the search is the fact that the name we submitted, that there is a name similar to that in some report—perhaps a hearing. That is the major—

Mr. WALDIE. Or a newspaper article?

Mr. DRUMMOND. It could be a newspaper article.

Mr. WALDIE. Would you know the difference? When the name is given to you, does it tell you?

Mr. DRUMMOND. Yes; they give us the name and the date of the newspaper article.

Mr. WALDIE. And can you—are you able to break down the numbers of time the report involves a name in a newspaper story versus a name in a report?

Mr. DRUMMOND. I am told, Mr. Chairman, that the majority of the results that come back are names that have appeared in committee hearings.

Mr. WALDIE. In committee hearings?

Mr. DRUMMOND. I am told that.

Mr. WALDIE. By whom?

Mr. DRUMMOND. By my people in the Bureau of Personnel Investigations.

Mr. WALDIE. So they have a record?

Mr. DRUMMOND. No; it's from experience, sir. They don't keep—to my knowledge, they don't keep an ongoing record of the information, because, first of all, the fact that a name appears in any record, one, you have the job of establishing the identity to see that the name of that person identified and our person who we have under investigation are one and the same. And many times it washes out right there.

Then when we do go to the source document where the name appears, many times it washes out right there.

Mr. WALDIE. Well, see, what I'd be very interested in is how much of these 20,000 names that you submit, that you get any response, the names are in the HISC files, if you get a response, the name is in the HISC files—I'd be interested in knowing how quickly you wash out that information.

Whatever you are trying to find out, does the HISC file give you anything at all of value in your investigations of these applicants for Federal employment? Can you answer that?

Mr. DRUMMOND. Well, I would say this, sir. It's another source.

Mr. WALDIE. I know it's another source.

Mr. DRUMMOND. Of investigative—

Mr. WALDIE. Is it a source of value?

Mr. DRUMMOND. In terms of productivity—may I make this offer to you, Mr. Chairman—You have asked a lot of questions, one, about whether any records are kept of individual searches. Now you are asking a question in terms of the productivity.

I would be happy to present a full document to the committee answering, as well as I can, all of these questions in terms of productivity.

From an investigative point of view, any source which may contain information which would have a bearing on the individual's character, habits, loyalty, is a source that we would want to go to. Naturally, for some of the positions we check—we used to check them all. We made a determination that, at the lower levels, the name checks were not productive because they aren't the type of people that normally would show in these files.

So that we could say that for the lower levels, it was not productive. But to be as responsive as I can, I would like to submit a written statement to the committee, covering all of these questions with respect to, one, the records that we keep, and two, the productivity of the committee sources.

Mr. WALDIE. I would be very interested in receiving that, and would like to receive it as early as possible.

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. May I go another question or two further?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. You submit roughly 20,000 names to the House Internal Security Committee for a check. Do other agencies of the Government, independent of your search, similarly submit names to the House Internal Security Committee for security checks?

Mr. DRUMMOND. Sir, I can't comment on that, other than to say that the 3,000 cases that we will probably handle, you see, we do all—

Mr. WALDIE. Do you mean 300,000?

Mr. DRUMMOND. Yes; 300,000. All of the national agency checks and inquiries that are done on new people coming into the service are done by us.

Now whether or not the military intelligence agencies and the Federal Bureau of Investigation make use of the House Committee files, I cannot speak for them, but I am sure that, as an investigative agency, there will be times when they will use it.

Mr. WALDIE. Nothing will prohibit them under the law that authorizes your use of this agency of the House Internal Security Committee? Nothing would prohibit other agencies from doing it?

Mr. DRUMMOND. I know of nothing that would prohibit them under the authorities governing their operations. There actually is no law that gives us the right to go to the House committee. In other words, nothing specified in any law that says we will check the House Committee on Un-American Activities—or the Internal Security Committee.

Mr. WALDIE. Well, the Executive Order No. 9835 of 1947, under President Truman, that set up the administration of an employee loyalty program.

Mr. DRUMMOND. Yes, sir, and that Executive order says that we would check the House Committee on Un-American Activities files.

But the Executive Order 10450, which superseded that order, made no mention of it.

Mr. WALDIE. Do you assume by that that the exclusion of the House Committee on Un-American Activities was intentional, and, therefore, you are precluded from seeking—

Mr. DRUMMOND. No, sir, I don't think so.

Mr. WALDIE. Why would they have left it out?

Mr. DRUMMOND. While Executive Order 9835 specifically listed the individual file sources to be checked, Executive Order 10450 was worded more broadly to require not less than "a national agency check, including a check of the fingerprint files of the Federal Bureau of Investigation. * * *" Thus it did not specifically include or exclude the House committee search.

Mr. WALDIE. But your interpretation is that this fact that they did leave it out had no bearing on anything?

Mr. DRUMMOND. No, sir.

Mr. WALDIE. So we can assume it is in?

Mr. DRUMMOND. Well, I think that under the authorities that we do conduct our investigations, that we have a right to go to any source that is willing to assist us.

Mr. WALDIE. Why would they have included it under Executive Order 9835, specifically?

Mr. MONDELLO. Is it stated as a requirement?

Mr. WALDIE. Yes.

Mr. DRUMMOND. It's part of the Executive order.

Mr. MONDELLO. Well, the change to 10450 simply omitted it as a specific requirement, but obviously would leave it in as permissive.

Mr. WALDIE. That is your interpretation?

Mr. MONDELLO. Yes, sir.

Mr. WALDIE. And your belief is that it is still a desirable source of information?

Mr. MONDELLO. I have no belief about that.

Mr. WALDIE. I guess, Mr. Drummond, that is your belief?

Mr. DRUMMOND. Yes; as I mentioned, qualifying it with the fact that it is a source to furnish possible investigative leads.

Mr. WILSON. Mr. Chairman—

Mr. WALDIE. Just one further question, Mr. Wilson.

When other agencies make checks on employees, and you contract with some, and some do it independently, is that correct?

Mr. DRUMMOND. Yes, sir, the military departments, the Air Force—

Mr. WALDIE. Post Office?

Mr. DRUMMOND [continuing]. Navy, Army—they do their own field investigations. We do the investigations—the NACI investigations on their new appointees. Treasury does their own full field investigations, although we do the NACI for their appointees.

Mr. WALDIE. State?

Mr. DRUMMOND. State Department does.

Mr. WALDIE. Post Office?

Mr. DRUMMOND. Post Office Department does, although we do the NACI for Post Office, but we take no action with it. We just furnish them the results of the investigation.

Mr. WALDIE. FBI. CIA?

Mr. DRUMMOND. FBI and CIA do their own.

Mr. WALDIE. NSA?

Mr. DRUMMOND. That's right. Justice Department—

Mr. WALDIE. Now, do you—excuse me. Justice?

Mr. DRUMMOND. Justice Department recently entered into an agreement with us that we would conduct some of their full field background investigations beginning in April with a gradual take-over for Immigration and Naturalization, for the Department of Prisons, et cetera.

Mr. WALDIE. Those that do not contract with you are performing their investigations pursuant to—

Mr. DRUMMOND. Executive Order 10450.

Mr. WALDIE. Executive Order 10450?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. And do you have any responsibility relative to their work?

Mr. DRUMMOND. We do have a responsibility under the order to evaluate the security programs operated under Executive Order 10450, within the establishment.

Mr. WALDIE. How often do you do that?

Mr. DRUMMOND. Shortly after the Executive order was passed, we used to review the agency security programs, well, in the period of the first 3 or 4 years, we visited each of the larger ones at least three times.

As the agencies became more sophisticated in the operation of the program, we started to cut back. During the past year, we have tried to set up a schedule where we visit on a security appraisal each of the larger Federal establishments at least once every 2 years.

Mr. WALDIE. How many people do you have employed in that capacity?

Mr. DRUMMOND. In the security appraisal function, right now we have budgeted for three man-years for the next fiscal year.

Mr. WALDIE. Three what?

Mr. DRUMMOND. Three man-years.

Mr. WALDIE. What does that mean? Three positions?

Mr. DRUMMOND. Yes, sir, three positions.

Mr. WALDIE. How many do you have now?

Mr. DRUMMOND. This year we are using three people on it.

Mr. WALDIE. Three people are reviewing—

Mr. DRUMMOND. Visiting agencies and reviewing the way they operate their security program.

Mr. WALDIE. And they then make reports to you as to how those agencies are conforming?

Mr. DRUMMOND. Yes, sir, the report goes from our chairman to the head of the agency that we have evaluated.

Mr. WALDIE. And are those reports available for this committee's inspection?

Mr. DRUMMOND. I'm not sure.

Mr. MONDELLO. I don't know the answer to that.

Mr. WALDIE. Well, I presume they would be, would they not? The question is, are those security programs being operated effectively—programs you have delegated your responsibility for—and I guess you have made an assessment that they have or have not.

And if you have made such an assessment, I would like to see the reports that were made last year on those security programs that are conducted independently by the agencies involved.

And if those reports are not made available, I'd like you to inform me.

One final question, Mr. Wilson.

Have you disapproved of any of the programs?

Mr. DRUMMOND. Well, we haven't to my knowledge, and I am speaking now, sir, with less familiarity than any of the other functions.

We haven't to my knowledge disapproved a program. We have suggested matters in which it could be improved. You see what we do is, before we even go into the agency, we look at a number of cases that they have acted on, or should have acted on, in the course of their operations.

And after we look at these cases on a sample basis, we also pull other cases that we would have no knowledge of when we visit the agency. We look at the qualifications of the individuals who are employed in the security function. We look at their own investigative files. And we try to ascertain whether information which is obtained through investigation is protected from unlawful disclosure.

And also to see whether the rights of individuals who are affected by the results of these investigations are protected.

Mr. WALDIE. Mr. Wilson?

Mr. WILSON. Yes; if I ask something that you have already responded to, please let me know.

I am interested in No. two, that we have been discussing. All other employees who have attended college since June 1968 that you make security checks on, you obtain information from HISC files, or other information. Whose decision was this?

Mr. DRUMMOND. The decision of 1971 you are talking about?

Mr. WILSON. Yes; the college graduates.

Mr. DRUMMOND. It was my predecessor.

Mr. WILSON. Do you think this is a reasonable category?

Mr. DRUMMOND. Sir?

Mr. WILSON. Do you think this is a reasonable category?

Mr. DRUMMOND. I'm not sure.

Mr. WILSON. Well, if you are not sure, you have the authority to change it, haven't you? If you feel your predecessor was wrong?

Mr. DRUMMOND. Well, I would not like to say my predecessor was wrong without taking a look at what I have offered to give Congressman Waldie.

Mr. WILSON. Are these for checks involving loyalty—Government security involving loyalty, or morals, or both?

Mr. DRUMMOND. Well, the check could produce information with respect to organizational affiliations; it could produce information with respect to incidents that might—

Mr. WILSON. You almost have to go to everyone who has attended high school since 1968, don't you?

Mr. DRUMMOND. Pardon?

Mr. WILSON. You'd almost have to go to everyone who has attended high school since 1968, wouldn't you? I assume what you are getting at is the people involved in antiwar activities. That's the principal reason you would set a date like this, isn't it?

I have two sons, both of whom participated in the last big antiwar activity here in Washington. I didn't encourage them to, by any means at all, but they did it.

One graduated from college—Georgetown University—and the other has not gone to college yet. In other words, the one who did not go to college, he could probably get a job with the Government without being checked on his loyalty.

The other one would be checked, is that right?

Mr. DRUMMOND. No; that is not true, sir.

Mr. MONDELLO. They would both be checked.

Before you came into the room, Mr. Wilson, the chairman asked us questions about this, and we have undertaken to go back and find out the quality of the information that led the predecessor to Mr. Drummond to believe that this bracketing of cases offered the highest potential for obtaining significant leads for investigation.

But the fact of the matter as between your two sons is that they would both be investigated if they were seeking Federal employment. One of them might be caught up in this policy Mr. Drummond discussed, and, therefore, a search would be made of HISC files. But that doesn't mean the other wouldn't be investigated fully as thoroughly.

Mr. WILSON. You mean everyone is investigated who applies for Government employment, regardless of the category of employment they applied for, or the agency that they applied for?

Mr. MONDELLO. Yes, sir, everybody is investigated who applies for Federal employment.

What we are seeking to do is determine whether the individual does indeed have the qualifications he is supposed to have for the job, whether he is fit or suitable for the job.

Incidentally, if we develop information about his background that would indicate that he is disloyal, we are supposed to look into that. We are directed by order to do so through the investigative facilities of the Federal Bureau of Investigation.

Mr. WILSON. What determines disloyalty these days?

Mr. MONDELLO. What determines disloyalty?

Mr. WILSON. Yes. Which Communists are we at odds with?

Mr. MONDELLO. We have been told by the courts, and we have acted accordingly, on the assumption that membership in no particular organization is disqualifying, per se. That if you want to deny someone Federal employment, or remove him, on the basis of disloyalty, you have a burden of proof.

And what you have to prove is that he was, indeed, disloyal. I suppose what that means is, if you can discover that he had committed acts of sabotage and had come close to blowing up the water works of some place for, say a foreign power, these are acts that I suppose would be regarded by any court as disloyal.

Whatever those acts might be, we have to prove them.

Mr. WILSON. Selling wheat to Russia?

Mr. MONDELLO. No; I am talking about disloyal acts. Espionage, treason, whatever.

Now the fact is that there are very few cases of disloyalty known to man, and certainly within recent years. They simply don't occur. I don't know if there has been a loyalty dismissal since 1965, or perhaps even before that time.

So we are talking about something that we are required to investigate, seldom find information about, and hardly ever, if ever, do anything about, because we simply lack the facts.

Mr. WILSON. Now you say that you request searches of the HISC files on those categories. Do you find very many instances where the

HISC does not have a file on the individuals you are seeking information on?

Mr. MONDELLO. That is information we have promised the chairman we will try to discover from our files, so that we can find out to what extent there is value in approaching this particular source of information.

Mr. WILSON. Well, this is interesting, that their files would be this broad, that they would be able to cover anybody who is a potential employee of the Federal Government, that they would have files on them.

Mr. MONDELLO. Mr. Wilson, nobody has such files. It just isn't possible.

Mr. WALDIE. We are working on trying to get it together, unhappily. Mr. Hillis?

Mr. HILLIS. On this point, let me ask you this, Mr. Mondello.

I'm sorry I am late this morning. I had to be in another committee meeting.

Let's assume that you uncover an applicant who has participated in an antiwar march or demonstration. How do you evaluate this? What weight do you give it? Will that automatically keep him from getting a job?

Mr. MONDELLO. No, sir.

Mr. HILLIS. Where do you draw the line of activity?

Mr. WALDIE. Excuse me. May I interrupt just a moment? Does that have any bearing at all? The fellow whose name was in the paper for having marched against the war, is that a factor that is evaluated in terms of his suitability for Federal employment?

Mr. MONDELLO. No, sir, I don't think it is.

Mr. WALDIE. Well, is it, or is it not?

Mr. MONDELLO. Well, in the cases that come to my attention—and there are a fair number of them—it is not.

Mr. WALDIE. Okay.

Mr. MONDELLO. But don't stop there. I'd like to continue the answer to that question.

Mr. WALDIE. All right.

Mr. MONDELLO. Assume that you have somebody whose name came out—I don't care if it's the HISC files, or any other source—that he was not only a marcher in an antiwar demonstration, but heaved a brick through a department store window, we'd ask him about that. We'd want to know why it was that he felt that for whatever cause, he was driven to throw a brick and destroy property.

We would be concerned, when he became a Federal employee, whether he would be acting the same way, and I think it's a perfectly legitimate question to ask.

What we depend on is not membership in an organization or marching in a parade. What it depends on is the actual activities that any person has conducted which would show his character.

Mr. HILLIS. Say he was arrested in a demonstration here in Washington in 1971. Would this automatically—

Mr. MONDELLO. No, sir.

Mr. HILLIS. Would you look at the facts behind the arrest to determine whether he was an active participant or a bystander?

There were quite a few bystanders swept up in that particular one.

Mr. MONDELLO. That's right. There are all kinds of people swept up in the affairs that went on then. And it would be ridiculous to think that participation of that sort in any of these events should be disqualifying from Federal employment. We don't think so. We really have a burden of showing some reasonable relationship between such conduct and the anticipated employment.

For example, most of the people who are subject to our investigations are already employed. They are currently working in the Federal work force, and through their first year of employment we retain the right in the Civil Service Commission by regulation to make the investigation and determine whether we have facts upon which we should dismiss them.

When we do have so-called derogatory information, we ask questions about it. We grant interviews to the person to come in and talk about it. Some of them don't want to talk to us, and some of those cases have gone to court.

Ordinarily, people will discuss their background with us, because we tell them we have discovered you were convicted of a misdemeanor or heaving a brick through a window in connection with a parade, and we find out his attitude about that, and sometimes they tell us, "I was 19 years old at the time; now I am 24 and looking for a job and I don't do that kind of thing any more." In which case, if you believe it, that's the end of it.

At any rate, if we decide that the information is significant, that it shows a fatal flaw in character, if you will, and bears on the qualifications of the person for employment, we move against him. We dismiss him.

That is done by the Bureau of Personnel Investigations or the Commissioner's regional office in the field, during that first year. And if the individual doesn't like what happened to him, he can appeal to the Board of Appeals and Review of the Civil Service Commission, and the proceedings go on ultimately to the courts.

Mr. WALDIE. Do you—are you the ones that move against him, or can the agency, independent of your action, move against him?

Mr. MONDELLO. Both.

Mr. WALDIE. In which instance do most actions fall—under what—who is the moving authority? Is it the Civil Service Commission that moves against the employee because of derogatory information, or is it the agency?

Mr. DRUMMOND. It's rather difficult, sir. I can give you some statistics for last fiscal year.

Mr. WALDIE. I'd like that. We are talking about 300,000 cases. Let me try and get a statistical benchmark.

Mr. DRUMMOND. I'm not sure it was 300,000. Let's say 275,000 to 300,000, last fiscal year.

Mr. WALDIE. Okay. That were investigated.

Mr. DRUMMOND. That were investigated through the NACI program—national agency check and inquiry.

Mr. WALDIE. And that would be every Federal employee?

Mr. DRUMMOND. Yes, everybody entering, except those entering into a critical sensitive position, where we just run the NAC, the

national agency check, without the inquiry, and furnish it to the agency and either they do the full field background, or we do it for them, but they make the decision.

Mr. WALDIE. Of the 300,000, that is your responsibility?

Mr. DRUMMOND. And of nonsensitive positions.

Mr. WALDIE. Of nonsensitive positions. How many last year were denied employment as a result of information derived from your investigation?

Mr. DRUMMOND. We directed the removal of 123 people last calendar year.

Mr. WALDIE. What do you mean, you directed the removal?

Mr. DRUMMOND. The investigations disclosed information which the Commission determined was disqualifying under its suitability standards, and we directed the agency to remove them, during the 1-year period that we have jurisdiction.

Now this individual would have a right to appeal, as Mr. Mondello points out. And I could not tell you, without further inquiry, and even if it were possible to get the figures on those, who may have been successful on appeal.

Mr. WALDIE. Please make that further inquiry.

Mr. DRUMMOND. Yes, sir.

That is the appointees—123 appointees. There were 3,394 individuals whose applications were not accepted.

Now this issue arises when somebody files under an examination and the application itself has information which requires a suitability determination. Now this could be medical disqualification, which—

Mr. WALDIE. Is a medical disqualification under your jurisdiction?

Mr. DRUMMOND. No, sir, we refer that to our medical doctors.

I am saying that these are cases where the individual files—either answers the questions by which a determination might be made that he is not—

Mr. WALDIE. What I am trying to find out is, is there really any reason to have your agency in existence? It came into existence in 1947, during the hysterical era of the McCarthy era, and it's been continued by, I suspect, neglect as much as anything else.

And I want to see what you produce with all this massive investigation and prying around. Of the 3,394 individuals whose applications were not accepted, how many of those individual applications were rejected because of the activity of your agency?

Mr. MONDELLO. I don't understand that.

Mr. DRUMMOND. They were rejected because of information appearing on the application.

Mr. WALDIE. I know, but was your agency involved at all in the rejection? Or did the agency that took the application make the decision?

Mr. DRUMMOND. Oh, no, we were the ones who rejected the application.

Mr. WALDIE. All right. And of those rejections, how many were due to this vague criteria of not suitable for employment, other than physical unsuitability?

Mr. DRUMMOND. I would say that probably a small number were due to medical questions, and the rest were due to suitability.

Mr. WALDIE. Give us an example.

Mr. DRUMMOND. A recent arrest, or a series of arrests, that would indicate that the individual would not be trustworthy.

The mere fact that somebody—and I shouldn't talk about arrests. I should talk about convictions, because we don't ask about arrests, on the application, we would only see convictions.

Discharges from employment within the recent past—and I am not talking about a year.

Mr. WALDIE. What employment? Federal employment?

Mr. DRUMMOND. Could be Federal employment, from a previous Federal employment, or discharge from private employment.

Mr. WALDIE. Is the fact that a man was discharged reason for not employing him—on his application?

Mr. DRUMMOND. Not necessarily. Because the special suitability determination cases that I am talking about is that the information is shown on the application, but a limited investigation is conducted before you take any action in terms of disqualifying him.

Mr. WALDIE. So all this 3,394 were not rejected on their applications? There was an investigation made of those people after their applications had been received?

Mr. DRUMMOND. Yes, sir, a limited investigation to ascertain the information concerning the issue that arose on the application.

Mr. WALDIE. All right. What other statistics can you give me?

Mr. DRUMMOND. Those are the only statistics I have for the past fiscal year, sir. Now we may develop derogatory information which we feel is not actionable in terms of the Civil Service Commission exercising its jurisdiction, and we furnish the facts to the agency.

I can't tell you how many have been—

Mr. WALDIE. Wait a minute. I don't understand that. You find derogatory information that is not actionable by the Civil Service Commission, but may be by the agency?

Mr. DRUMMOND. Could be.

Mr. WALDIE. In what way?

Mr. DRUMMOND. Depending—well, the agency is in a better position to determine whether or not the individual is suitable for that particular position.

Mr. WALDIE. Why are they? Do they have any broader right to interpret the law than you do?

Mr. MONDELLO. They have closer knowledge of the position.

Mr. WALDIE. Well, isn't it the same law we are dealing with?

Mr. DRUMMOND. They operate under our suitability standards; yes.

Mr. WALDIE. You set the standards, don't you? And you find derogatory information is insufficient to find them unsuitable, so you refer them to the agency so they can find them unsuitable?

Mr. DRUMMOND. I don't think so.

Mr. WALDIE. Is that what we are talking about here?

Mr. MONDELLO. No; I wouldn't put it that way. The fact is that we do conduct investigations, we look at the evidence we get—

Mr. WALDIE. And find it insufficient.

Mr. MONDELLO. We find we wouldn't regard the individual as generally unsuitable.

At that point, we pass the information on to the agency. Let's assume that in a particular case we discovered that an individual, at age 17, had committed petty larceny, and at the age of 21 had committed an offense and been charged with embezzlement, and got off on a count of misappropriation of funds, or something of that sort, a lessening of the severity of the offense.

At this point, we send the information on to the agency, we having decided either that the event is so stale and old, or occurred at such a time in the person's life that he is presumptively rehabilitated from it, and there's no recent evidence of such activity.

When it goes to the agency, we find that he is going to be the clerk to a disbursing officer, and that the agency is considering placing him in a position where he is going to be dealing with money, and they are more troubled about that kind of evidence in his background than we were because we may not have known that was the precise position he'd be in. All we knew was that it was a clerk job. We didn't know it was clerk to a disbursing officer.

Mr. WALDIE. What kind of investigation do you make if you didn't know that?

Mr. MONDELLO. You can make whatever judgment you wish about that.

Mr. WALDIE. I make a judgment that you don't make much investigation if you don't know what the position is that the man is applying for.

Mr. MONDELLO. I was talking about a hypothetical case. If you want to take a real investigation—

Mr. WALDIE. Give me a real case. Don't give me names, but a real case where you find the man suitable but found derogatory information that you passed on to the agency and they found him unsuitable.

Mr. MONDELLO. In my 5 years with the Civil Service Commission, I have heard of one such case involving the Post Office. I don't know the name and facts of it. If you really want to know about that one, I will try to find out.

Mr. WALDIE. That's the only one in 5 years?

Mr. MONDELLO. That's the only one that came to my attention in 5 years.

Mr. WALDIE. So this practice you are talking about, of agencies finding employees unsuitable when you have found them suitable, is very rare, is it not?

Mr. MONDELLO. I think it's relatively rare, but if you are asking me for my testimony this morning on the basis of my personal information, I sit in the General Counsel's office at the Commission. I don't pass on all of these cases, and I can only tell you about the ones that come up to me. My experienced judgment would tell me that that is a relatively rare situation.

Mr. WALDIE. Well, let's confirm that judgment. You can provide that statistic to the committee, too, Mr. Drummond, can you not?

Mr. DRUMMOND. I will do my best, Mr. Chairman.

Mr. WALDIE. Is it going to be difficult?

Mr. DRUMMOND. It may well be.

Mr. WALDIE. Why would it be difficult to provide a statistic?

Mr. MONDELLO. We don't keep records of everything that goes on in the Federal establishment, or else we'd be keeping records and doing nothing else. We don't keep records to line up in neat little categories of this sort. I don't know if such data is critical to the functioning of anybody.

Mr. WALDIE. Well, it's critical to this committee to determine whether, in fact, you are performing the function of determining suitability of employees, or whether agencies are.

Now, I have information that is nebulous and thus far unsubstantiated that, in fact, the agencies are making the determinations and that you have the responsibility of making certain that determinations by the agency are correct.

I gather that you are now telling me you don't even know how often the agencies reverse a determination by you that an employee is suitable?

Mr. MONDELLO. That is precisely what I am telling you.

Mr. WALDIE. What, then, is the responsibility under the law of your review of suitability for employment programs of the agencies.

Mr. MONDELLO. Every agency head has the direct responsibility, Mr. Chairman.

Mr. WALDIE. But do you not have the responsibility under the law of determining whether those programs are being exercised fairly in terms of the employee?

Mr. DRUMMOND. Yes, sir.

Mr. MONDELLO. Absolutely.

Mr. WALDIE. And if it is in fact the case—and I don't know that it is—that a great number of cases wherein you have found the employee suitable is later found to be unsuitable by the agency, that that is an indication that your program isn't working well?

Is there a different standard on the agency level than on your level for suitability of employment?

Mr. MONDELLO. The standard is the same, just as it is for all district judges. They hear the same kinds of cases and they sometimes come out with different decisions.

Mr. WALDIE. I expect that is right.

Mr. MONDELLO. That's why you have appellate procedures.

Mr. WALDIE. That's why we have you. You are responsible for it.

Mr. MONDELLO. The law also says the agency head is responsible. Executive Order 10450 says so.

What's more, the appointing power that Congress places in the agency head makes him responsible.

Mr. WALDIE. Does it not give you the responsibility of evaluating the fairness of those programs?

Mr. MONDELLO. Absolutely.

Mr. WALDIE. All right. In finding out if these programs are fairly administered, should you not be able to respond to my question, does the agency reverse your decision as to suitability? Can you tell me that?

Mr. MONDELLO. Well, I have told you already that I think it very rarely occurred. Mr. Drummond has assured you he will go back and find out precisely.

Mr. WALDIE. He told me he would find out if he could find statistics. Can you find statistics to tell me precisely?

Mr. DRUMMOND. I am not sure, sir.

Mr. WALDIE. So he hasn't told me that.

Mr. MONDELLO. He told you what I told you he told you. I told you he assured you he'd go back and try to find out for you, and we will do that.

Mr. WALDIE. Let me know as quickly as possible whether you have such statistics.

What are your standards for suitability of employment? We have crossed out loyalty or disloyalty, I gather, as a reason for either discharge or not employing anybody. That is passe now, isn't it?

Mr. MONDELLO. It's still there. Mr. Chairman, it is there, and we have to pay attention to it.

Mr. WALDIE. I agree, but as you say, nobody has been denied employment and nobody has been fired because of that since 1965.

Mr. MONDELLO. I think that is right.

Mr. WALDIE. So it's still there, and we go through all the nonsense of going to HISC and wherever, but since 1965 we have never discharged anybody or denied anybody employment because of loyalty or disloyalty? Is that correct?

Mr. MONDELLO. I think that is correct, yes, sir.

Mr. WALDIE. So there are other standards we are working on.

Mr. MONDELLO. Well, hold it. I remember a case—the name is Duncan Earl Gordon—handled in the district court here.

Duncan Earl Gordon was a member of the Socialist Workers party and he was dismissed by Mr. Drummond's predecessor during the first year of employment for his activities in connection with his membership in that party. That case went to litigation.

It was my judgment that we really didn't have the facts to proceed as to loyalty. And that judgment was vindicated, I suppose, by the determination of the District Court.

So that when I say there have been no dismissals on account of loyalty, that case may have been, in effect, an effort to dismiss on account of loyalty.

Mr. WALDIE. There have been efforts, but no successful efforts?

Mr. MONDELLO. I know of none, and I think there are very few efforts of that character.

Mr. WALDIE. So among the standards for the employment in the Federal government, loyalty or disloyalty apparently isn't much of a standard any longer. So there must be other standards that picked up 123 people that you directed their removal, and 3,394 individuals whose applications were not accepted last year.

None of those were loyalty cases?

Mr. DRUMMOND. I assume that they are not.

Mr. WALDIE. So they are all suitability of the employee, were they not?

Mr. MONDELLO. Yes.

Mr. WALDIE. Tell us now what standards constitute suitability of employment?

Mr. MONDELLO. Well, the standards as they are written in the regulations are the following: "Dismissal from employment for delinquency or misconduct..."

Mr. WALDIE. Where is that?

Mr. MONDELLO. 5 CFR 731.201. Reasons for Disqualification.

Mr. WALDIE. Just for my understanding, is that the regulation that expands the Executive order on this issue?

Mr. MONDELLO. Well, I think it is really responsive to both the Executive order and the Civil Service Act and other statutes that require us to investigate as to quality and fitness. It refers to subpart C of this part.

I can tell you what subpart C is about. It's suitability rating and actions.

Mr. WALDIE. That's right.

Mr. MONDELLO. The commission may deny an applicant examination—that is the process Mr. Drummond was telling you about a moment ago—deny an eligible an appointment and instruct an agency to remove an appointee for any of the following reasons: They run (a) through (g).

- (a) Dismissal from employment for delinquency or misconduct.
- (b) Criminal, infamous, dishonest, immoral, or notorious disgraceful conduct.
- (c) Intentional false statement or deception or fraud in examination or appointment.

Let me stop to tell you, we do get cases still where man X will hire person Y to go and take an examination for him and phony up the credentials.

(d) Refusal to furnish testimony as required by 5.3 of this chapter. And 5.3 is a rule of the President binding on the Civil Service Commission which requires people to answer the questions put to them in matters within the jurisdiction of the Commission.

(e) Habitual use of intoxicating beverages to excess. That relates specifically to a statute which has the same requirement.

(f) Reasonable doubt as to the loyalty of the person involved as to the Government of the United States.

(g) Any legal or other disqualification which makes the individual unfit for the service.

And (g) I think covers such things as the nepotism statute in 5 U.S.C. 3110, and I guess citizenship and other so-called legal disqualifications.

Those are the suitability regulations which all agencies and we follow.

Mr. WALDIE. Now will you apply to the 123 people who were directed removed, for the committee's information, the subsection on this suitability disqualification which applied—or subsections?

I'd like to know, for example, which one was the most commonly applied. As well as the same break down for the 3,394 individuals whose applications were not accepted.

Will there be any difficulty in that?

Mr. DRUMMOND. We will furnish it to the best of our ability.

Mr. WALDIE. Do you think there will be difficulty in doing that?

Mr. MONDELLO. So far, we have undertaken to furnish you a good deal of information, some of which I don't know is readily obtainable.

Mr. WALDIE. What about this?

Mr. MONDELLO. The 123 cases, that ought to be relatively simple, and perhaps even the 3,000. But, mind you, handling 3,000 anything is going to take a clerk some time to go and check records and make these checks.

Mr. WALDIE. Sure. But there are, on those—whatever papers terminate the application, there is an assignment of the basis for his disqualification, is there not?

Mr. DRUMMOND. I would say yes, sir.

Mr. WALDIE. What is the procedure? Suppose the application is sent to you for review, and you look at it and say, "My God, the man is obviously disqualified under section (b) because he has confessed to wire tapping," so it's criminal, infamous, dishonest, immoral, notoriously disgraceful.

What do you do then?

Mr. DRUMMOND. All of the applications that come in are not referred to us for review. The applications go to our area offices, where the examining function is carried out. And they are reviewed there, and in the course of their review, if they see one of the questions that might be raised, then they send it to one of our regional investigations offices, or, in the Washington area, our office here.

At that time, a determination is made with respect to what we call a special suitability determination. It could be made just by an examiner looking at it and saying accept the application, and if it's a question that needs further investigation, limited investigation would be conducted, or limited inquiry, to ascertain this, and if the individual's application is denied, he is told about it. I mean, it isn't a question—

Mr. WALDIE. He is told, but is it also recorded, written by hand or typewriter, somewhere?

Mr. DRUMMOND. There has to be some record.

Mr. WALDIE. I would assume.

Mr. DRUMMOND. I will do my utmost to get whatever you have asked for, or supply the reason why it isn't.

Mr. WALDIE. What I am trying to find out is, what are the suitability disqualifications that are most commonly utilized to rid the service of unsatisfactory employees or to prevent such a person from coming in. Mr. Wilson?

Mr. WILSON. No questions.

Mr. WALDIE. Mr. Hillis?

Mr. HILLIS. Just one question, Mr. Chairman. Do you feel that it's really necessary to have these background investigations? Would you just respond generally?

Mr. MONDELLO. On qualifications alone, I think the background investigation is very useful—let me put it this way:

Personnel selection is anything but a science. Psychologists have tried all kinds of examinations and a variety of different practices to determine the quality of personnel. They use personality assessments and questionnaires of all kinds.

The best tool I have ever seen for making a determination on whether a person has the ability to meet and deal with people, whether he indeed has the qualifications he professes to have, how he stacks up in the eyes of his associates, whether he is a producer, and industrious. All the things you'd like to know about any man you are going to hire for your staff is what we hope to assemble in a background investigation, so the appointing official in the Federal Government can make an informed judgment as to whether he should hire this or that individual.

Mind you, many times you are judging people in competition. You want to get the best you can. And you make a judgment based on the information you have about the people that has been gathered in this way, and the job duties that he is going to have to do, and you do the very best that you can.

The higher the level, the more information you want to have about such people. Hiring your chief of staff, for example, as distinguished from hiring a clerk. And the background investigations in some cases are very useful. They are sometimes all there is. And they are the best there is.

So, yes; I think that both to check out the qualifications of individuals, as well as their suitability, the background investigation is very, very useful.

Mr. HILLIS. That's all the questions I have.

Mr. WALDIE. Do you have access to private sources that accumulate information on individuals when you are making your background investigation, such as credit agencies, such as right-wing organizations that collect information, and there are left-wing organizations that collect information about associations of individuals with different groups? Do you have access to those files also?

Mr. DRUMMOND. We do have access, sir, to credit reporting agencies, unless there is a specific law in the State, and there is such a one in New York State which we are currently getting an exception from.

Mr. MONDELLO. You don't have direct access to their files.

Mr. DRUMMOND. Not to their files. We search the name through and they give us the information.

Our normal checks—and not in all cases. We wouldn't just go to the credit bureau for every case. Here again, it's a situation where the investigator determines whether or not credit information is necessary, more for lead purposes than anything else.

We check the local police files to the extent that we are allowed to. We do not go to any other organizations of the type that you have mentioned, in terms of organizations that keep files on people.

We go to employers. We go into an individual's neighborhood, and we go to references. Anybody who might be in a position to know the individual, to give us some assessment.

I would like to say, Mr. Chairman, in view of the question of Mr. Hillis, the majority of the investigations we conduct were not what we call full-field background investigations where the investigator makes personal contact. The majority of them are national agency checks and inquiries, which is really a paper investigation done by vouchering previous employers, educational institutions, and it's only

if these paper vouchers develop information that a determination is made as to whether or not a personal investigation should be conducted, not in terms of a full-field background, but in terms of resolving the information that is presented to us.

So that, in the course of, say, this year, there probably will be only 45,000 background investigations—full-field background investigations—conducted by us and other investigative agencies.

The predominant number will be the national agency check and inquiry, and there is a vast difference.

Mr. MONDELLO. Also, these investigations are not in any way covert. Our investigator is directed to show his identification, explain why he is there, explain that responding to his questions is voluntary—and some people do take advantage of that.

We don't have trash receptacle checks or any of the normal surreptitious activities. We just walk into the community of association, or neighborhood, and simply tell people we are examining the background of an individual for employment, and whatever they say, they say.

But it's all open and above board.

Mr. WALDIE. In Mr. Drummond's statement, on page three, he says:

In cases in which the Commission does not take jurisdiction (excepted service and sensitive positions) we furnish the completed reports of investigation to the employing agencies, which are expected to invoke the same safeguards to individual rights as the Commission does.

What are the excepted services, and sensitive positions?

Mr. DRUMMOND. Well, of course, under Executive Order 10450, the agencies are responsible for determining the suitability of people occupying sensitive positions.

Mr. WALDIE. Who determines what a sensitive position is?

Mr. DRUMMOND. The agency head determines which positions in his agency are sensitive and which are nonsensitive and they are broken down to critical sensitive and noncritical sensitive.

Critical sensitive requires a full-field background investigation. Noncritical sensitive requires a preappointment national agency check, but not the inquiry. The inquiry can be post-appointment.

Mr. WALDIE. What are the excepted service positions?

Mr. DRUMMOND. Excepted positions—for example, the Federal Bureau of Investigation is in the excepted service. Mr. Mondello is in it. He has an excepted appointment, although he works for an agency in the competitive service.

Mr. MONDELLO. That is true of all lawyers. Every general counsel's office that hires lawyers, in every agency, hires those lawyers in the excepted service.

Mr. WALDIE. Why?

Mr. MONDELLO. That's a creature of statute. The Commission, in 1945, or thereabouts, in a budget rider—since always put on our appropriations—was prohibited from examining with respect to lawyers. We don't hold competitive examinations, for example, on lawyers, and that's true of all excepted positions. The Commission doesn't examine.

So we place all lawyers in the excepted service because of that appropriations rider. And our regulations, by the way, have a com-

plete list of just what the excepted service is. There are three schedules—A, B, and C—in the excepted service, and everybody knows whether his position is excepted or not.

Mr. WALDIE. What was your budget last year, or what is your budget request this year?

Mr. DRUMMOND. In fiscal year 1972, the total cost of operating the Commission's investigatory program, in round figures, was \$16,500,000. Full field investigations for critical sensitive positions in the Federal service, AEC contractor personnel, and applicants for employment in the international organizations, there were approximately 20,000 of these cases, at a total cost of \$13,000.

At that time our billing rate for each case of \$650.

National Agency Checks and Inquiries for employment in non-sensitive and noncritical sensitive positions, approximately 250,000 cases, total cost of \$1,750,000, or approximately \$7 each. I would estimate that the price now is between \$7 and \$8 for those.

The cost for a full field investigation at this time is \$675 a case.

Mr. MONDELLO. When Mr. Drummond said \$13,000, he meant \$13 million.

Mr. DRUMMOND. \$13 million.

Mr. WALDIE. Is the \$13 million in addition to the \$16 million?

Mr. DRUMMOND. It's part of it. \$1,750,000 comes from an appropriation. The \$13 million comes from other agencies. We do their cases on a reimbursable basis.

Mr. WALDIE. Is it fair to say that the expenditure of \$16 million was to review not more than 300,000 cases last year?

Mr. DRUMMOND. 20,000 of those, sir, which represents the \$13 million, are full field background investigations, most of which were required by Executive order because the individual was going into a critical sensitive position, or they were for AEC contractor personnel, which we investigate under another statute.

Mr. MONDELLO. But the answer to your direct question is yes.

Mr. WALDIE. Of those 20,000 that \$13 million was spent for, would that be where the 123 people that were directed to be removed?

Mr. DRUMMOND. No, sir.

Mr. WALDIE. None of them?

Mr. DRUMMOND. The figure I gave you on the 123 were national agency checks and inquiries cases for nonsensitive positions and positions over which we had jurisdiction.

Mr. WALDIE. So of the \$13 million that was expended in investigating 20,000 people, no removals were found necessary?

Mr. DRUMMOND. We don't make the decisions on those, sir.

Mr. WALDIE. Oh, the agency makes those decisions?

Mr. DRUMMOND. Yes; but in our security appraisal, we do look—first of all, the agency sends us a card back after we do an investigation for them, within a certain period of time, telling us what they did with them. So I couldn't tell you how many—

Mr. WALDIE. So we could find out?

Mr. DRUMMOND. Some of them aren't put into a position because of the critical nature of it, but they still could remain on the rolls in the position they were in before. They are not all new appointees, either.

Mr. WALDIE. Is that inquiry under the Executive order? Of these 20,000 people, is that done under the Executive order authority?

Mr. DRUMMOND. No; some of them would be under the Executive Order, and some—

Mr. WALDIE. Under the AEC?

Mr. DRUMMOND. Under the AEC contractor personnel. And others could be people who are investigated and a full field investigation requested.

Mr. WALDIE. So most of your money, \$13 million out of \$16 million, is spent to do investigations for agencies that make the decision themselves, that you do not participate in the decision?

Mr. DRUMMOND. That's right, yes, sir.

Mr. WALDIE. Is that right?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. And so, I guess to determine your worth, we ought to know how many decisions have been made by those agencies on the basis of your information, or whether you are just spinning wheels.

Is there any way we could get some sort of feedback as to the 20,000 people that you investigated with that expenditure of \$13 million?

Mr. DRUMMOND. I'm not sure that I can get you precisely what you want. But as I stated before, I will give you whatever is available.

But do you think that the worth of an investigations program, a personnel investigations program, should be judged merely on the basis of the number of people that are kept out rather than whether or not these investigations do have some contribution—I'm not talking about NACI, I'm talking about the full field background investigations—to making intelligent employment decisions, suitability disregarded?

Mr. WALDIE. I don't know. I guess I will give you an answer to that question at the end of our committee inquiry.

I know \$16 million is a lot of money to spend to look at all of our Federal employees. I know it involves our concern with privacy and the manner by which these investigations are conducted.

And I just really can't answer that question. My own impression is—maybe historically you can tell me, what happened prior to 1947? How did we perform this task? Or did we just let the agencies make their own decisions as to employment?

Mr. DRUMMOND. Well, sir, the basic authority to inquire into the relative capacity and fitness of Federal employees is contained in the Civil Service Act.

And the Commission—I can only speak from 1952, but we had an investigations program even prior to that time. At that time, they weren't called investigators, they were called principal field examiners. So we have always had one.

Now I am not saying that that is the reason why anything should continue.

Mr. WALDIE. Right.

Mr. DRUMMOND. But I do not think that a program should be judged on the negative aspects solely, but more on the positive as-

pects, because it does give our people—the people we work for, the public—some assurance that people who are entering into the Federal Service are of good character and reputation.

Mr. MONDELLO. And on occasion, agencies have asked us for special information in the full field background investigation. For example, the Peace Corps, which had a problem of finding people capable of representing the United States' interests abroad.

Ultimately, you could ask our client agencies whether they think they are getting their money's worth out of this, and whether it does lead to better appointments.

What is it worth to you to appoint as the chief of staff of your office an individual who will really make the place hum, rather than a mediocre talent.

Mr. WALDIE. All those are certainly proper areas of inquiry, and I am not personally thus far persuaded totally towards the impression I may have left with you. I am persuaded, however, that whatever is in the file, I am really concerned about your situation where you say the man is suitable and you pass him, but you don't think there's enough to get rid of him or do whatever you want, so you send the derogatory information to the agency with the understanding the agency will take care of that matter.

I don't think it's the function of your Bureau, and I think it's an abuse of your responsibilities if that occurs.

And I gather—

Mr. MONDELLO. We'll have to find out.

Mr. DRUMMOND. Well, to the extent, of course, in saying this, I wanted to be as complete as possible in responding to your question. The fact that we did not make an adverse judgment, wouldn't preclude one having been made.

But I think I would have to agree with Mr. Mondello that the occasion for this being done is probably rare.

Mr. WALDIE. Let me ask just one final question.

You don't make an adverse judgment; you find derogatory information which is not sufficient to find the person not suitable, you send it to the agency, and the agency doesn't find it sufficient to find him unsuitable. But does the agency keep that in that file—the man's file—or does the agency have access for that remaining live in that Federal employee's file?

Mr. DRUMMOND. The file is not kept with his personnel folder. It is kept separate, and it is our property, and may be recalled.

Mr. WALDIE. Separate in the agency?

Mr. DRUMMOND. Yes.

Mr. WALDIE. What do you mean it's your property? They don't have access?

Mr. DRUMMOND. No; all investigative reports that we conduct are our property, and it says so on the face of the report, and cautions them on safeguarding the material, and we can recall it at any time.

Mr. WALDIE. If it's your property, why don't you keep it in your files, rather than let the agency keep it in theirs, to make certain your cautions are being fulfilled?

Mr. DRUMMOND. Most of them are either in our files or don't exist

in the NACI, because if the case is cleared, all there is is a record that the individual was investigated under the NACI process, was cleared under section so and so of the executive order, and there is no file. Everything that has come in is destroyed.

Mr. WALDIE. What about the files that are in the agency hands, marked your property?

Mr. DRUMMOND. I'm not sure of this, sir, whether after they look at it they return it to us. But I will ascertain that. It is our property, and we can recall it at any time.

Mr. WALDIE. I gathered you said it is held by them but marked your property.

Mr. DRUMMOND. Well, if they do keep it, I am saying——

Mr. WALDIE. Why should they keep it?

Mr. DRUMMOND. Well, they do keep all of the full field investigations.

Mr. WALDIE. Why?

Mr. DRUMMOND. Because we do them for them. They have requested us, contracted to pay us.

Mr. WALDIE. So those are not marked your property?

Mr. DRUMMOND. It is. It is still our property, but they maintain it within the agency security files.

Mr. WALDIE. Well, if it's your property, why is it not kept under your files?

Mr. DRUMMOND. Well, just like our personnel folders, the personnel folder on every employee is the property of the Civil Service Commission, but it's maintained by the agencies where the individual is employed.

Mr. WALDIE. Is that correct?

Mr. DRUMMOND. Yes, sir.

Mr. MONDELLO. They have a daily need for the official personnel folder, as distinguished from the investigation reports.

Mr. HILLIS. Perhaps I missed it. Who has access to these files if they are at the agency, but marked your property?

Mr. MONDELLO. I think they are required to be kept in the security office and not in the personnel office.

And that's one thing I think Mr. Drummond is going to have to find out; what kind of monitoring we do of the agencies to see that they do keep the files that way, or whether the files, indeed, are returned to us, in which case there is no problem in the agency.

Mr. HILLIS. Can you inform the committee of who has access?

Mr. MONDELLO. Yes, sir, we intend to do so.

Mr. WALDIE. Thank you, gentlemen. I appreciate your frank responses, and we will await your written response to my numerous inquiries.

If you need help, our staff will be happy to provide it.

Mr. MONDELLO. If the transcript is made available, we can read from that.

Mr. WALDIE. Yes, sir, it will be furnished to you. Thank you.

Our next witness is Mr. Clark Mollenhoff, chief of the Washington, D.C., Bureau of the Des Moines Register.

STATEMENT OF CLARK MOLLENHOFF, CHIEF, WASHINGTON,
D.C., BUREAU, DES MOINES REGISTER

Mr. MOLLENHOFF. I was a little antsy about getting on, because I do have work to do. And in addition, I have heard all of the explanations from these people over at the Civil Service Commission so many times, with their generalities and statistics that really mean nothing when you see how they have been applied to specific cases.

They engage in speculation and statistics. I am going to try to deal with specific cases.

And in this respect, I am sure that there are many people around the city—some that I know who are in this room—who can be most helpful to this committee with regard to examples of the failures of the Civil Service Commission.

I have specific reference to John D. Hemenway, the Foreign Service officer who was selected out of the State Department, Steve Koczak who was also selected out of the State Department, Ernest Fitzgerald, who is a consultant on your staff here, Miss Allison Palmer from the State Department, Charles W. Thomas—no longer around because the bureaucracies' inadequacies were so frustrating he committed suicide, but his widow is available for testimony.

Others are Dwayne York, who was an employee of the Grumman Engineering Co.; Phil Ryther of the FAA; Warren Card, a Foreign Service officer who was forced to leave his post in Iceland under a phoney dubbed medical charge, was brought back to the United States, and had to prove that he was mentally competent. And then the Kenneth Cook case, on which I am sure you are familiar with the details. Several of my syndicated columns deal in some detail with these matters.

I might say that listening to Mr. Mondello and his generalities reminds me of the fact that something like a year ago, I was having discussions with Mr. Mondello on the closed hearings that the Civil Service Commission was insisting upon in the Ernest Fitzgerald case. I recall the discussion with Mr. Mondello because he and Herman Staiman were the leading advocates of closed hearings as a device for getting to the truth easier.

They were unconvinced that Mr. Fitzgerald believed he could get to the truth easier in an open hearing. And they persisted in this objection to an open hearing although a district court decision by Judge Bryant was against them. They finally had to give it up when the Justice Department wouldn't appeal the decision against them in the appeals court.

And I might say that the appeals court decision was unanimous against closed hearings—unanimous in a statement that due process of law required open hearings.

I had assumed that this was a concept that everyone in the United States understood, and anyone in the law, specifically, would understand. I was amazed that Mr. Mondello even went so far as to defend closed hearings, and was so blind that he put this in writing to Senator Proxmire in defending this.

It's my understanding that Mr. Mondello wrote the letter that

Robert Hampton signed, defending closed hearings. They finally had to abandon closed hearing because the appeals court went against them. Significantly, the appeals court decision was unanimous. Judge Tamm, a most conservative judge, and Judge David Bazelon, were on the panel, and the decision was written by Burnita Matthews, senior judge of the Federal District Court.

Now I have viewed these injustices over a period of years. I was glad to see Ralph Nader do a critical job on the Civil Service Commission. I do not see eye to eye with Ralph Nader on many things, and I guess that's putting it mildly, but I think that he did a most magnificent job in the study of the Civil Service Commission. Nader called his work the Spoiled System.

The Nader group demonstrated, through the cases, the arbitrary, arrogant disregard for the rights of Civil Service employees. I don't fuss about the ways various groups assemble the facts. I want them to make their decisions on the maximum number of facts that they can.

But the record is replete with indications that there are rigged medical reports and rigged psychiatric reports, and that they are not disregarded by the agency people who make the decision, when there is clear evidence that the medical decisions are not valid. The *Kenneth Cook* case is a recent example.

In that instance, Kenneth Cook, a weapons analyst, had written an opinion that was at odds with his superior. The superior on the base took action against Kenneth Cook and had the base doctor examine him, and there was a resulting report that Mr. Cook should be fired or dismissed because he was determined unqualified due to the base doctor's medical findings.

This was in litigation for a period of years. Even after the top Air Force psychiatrist had stated that there was nothing in the base doctor's reports on Kenneth Cook that should have disqualified him for his job, the Air Force refused to turn around. And the Civil Service Commission, despite pleadings months after month by Mr. Cook refused to intervene. I might say that I personally called on the chairman of the Commission, Mr. Hampton, and other individuals at the Commission, in an attempt to get them to try to do what was fair and what was right in this case. It was all futile.

And when I see Mr. Drummond and Mr. Mondello sitting here and making legal distinctions as to what is whose responsibility, I have an antagonism to them. It is because I have seen that they really are not concerned with doing what is fair and just and going out of their way when it gets down to the individual cases.

Now, to proceed with my prepared statement.

I should like to emphasize that the term "invasion of privacy" does not cover only, or even primarily, illicit or improper inquiry into the private life of individuals.

In private life, "invasion of privacy" generally is associated with blackmail. In public life, it is usually done with a view to improperly discrediting some public figure, whether running for elective office or employed by the Government, whose views are unwelcome to the party in power or the management of top Government agencies who are covering up some mistake.

I think that the situation of John Dean in the *Watergate* case and the efforts that the administration, through various devices, has made to discredit him, is probably the most dramatic thing we have had in recent months. I think that there are many other things that have been revealed by the *Watergate* case that are quite applicable to what has been taking place with others over an extended period of time under the eyes of the Civil Service Commission, and under what is supposed to be the protective shield of the Civil Service Commission.

It extends to those acts which we generally refer to as libelous, that is, the malicious disclosure or publication of allegations about human beings or corporations.

Certainly a trial in a criminal case brings out facts about individuals which they would prefer to keep private. Nevertheless, since these are criminal acts, our society considers it proper that they be discovered and identified and punished.

Consequently, proper judicial inquiry into these acts are not invasions of privacy. Moreover, even in these trials only those matters directly related to the criminal process may be revealed. Other matters involving the character of the person, even relating to previously established criminal activity, are excluded as prejudicing the right of the defendant to a fair hearing, to genuine due process.

The right to privacy, then, is directly related to due process, to the total elimination of prejudice from public disclosures of facts.

The most subtle and perhaps the most sinister form of invasion of privacy is one about which the public hears very little, although thousands of American citizens have suffered under it. It concerns the invasion of privacy, not so much by prying into the private lives of citizens, as fabricating a false image about them which is then projected before the public, that is, the rigging of personnel files through the agencies, and condoned by the Civil Service Commission, when it is apparent to everyone but the blind people over at the Civil Service Commission that the files are rigged.

The Federal Government personnel managers have now developed an expertise in preparing false administrative indictments against Federal employees whose records they control. The hearings which are held are in effect "star chamber" hearings, where the employees often have no opportunity to cross-examine their supervisors or even to obtain documents to prove them wrong.

In some cases, these managers resort to allegations about the mental or emotional health of the employees, and have them declared "retired on medical grounds." The Cook case, and the Warren Card case were the most recent examples of those.

These actions are administratively very similar to recently reported Soviet procedures where dissidents have been declared to be "insane" and incarcerated in insane asylums.

In some departments, notably those claiming the "right of Executive Privilege" and the right to classify documents, there is evidence that the top managers arrange to introduce malicious and false testimony into the records, which are then not shown to the employee on the grounds of their being internal documents or classified security documents.

On such grounds, the careers and reputations of these employees are destroyed.

The Watergate revelations have opened the eyes of many people to the wide latitude of action which can be taken by a group of powerful people, protected by executive privilege, having fierce in-group loyalties. I suggest that it would be useful for your committee to look at the departments and agencies which have been named to date, and even more importantly, to look at the names and offices of the persons involved.

I might say on that particular point, William Macomber, who was in charge of the whole personnel situation at the State Department, has a deplorable record, and I think that it might be grounds for rejection of Elliot Richardson—just the mere fact that Richardson was the Administrative Officer in charge at the State Department when some of this took place, and he was unable to uncover the cover-ups in those situations.

Richardson's record, as far as I am concerned, in uncovering cover-ups falls far short of a record that would commend him to me as one to be put in charge of the explosive Watergate probe.

In addition to the White House staff those who could have been covered by executive privilege include members and former members of the National Security Council, the names which have been published include L. Patrick Gray, the former Acting Director of the FBI; General Robert Cushman, Deputy Director of the CIA, and at the State Department, Deputy Under Secretary, William B. Macomber, Jr.

Macomber authorized the use by Howard L. Hunt of more than 2,500 classified documents which he should be questioned about.

Later on in my testimony, I shall return to the role played by Mr. Macomber for many years as the top personnel administrator of the Department of State. As I shall show, his handling of personnel records and the protection of their privacy was not much better than his protecting the privacy of these classified documents.

As difficult as the recent ordeal of Senator Thomas Eagleton has been, the debate over his suitability as a vice-presidential running mate for Senator George McGovern has been in public.

Many governmental employees are dismissed each year on the basis of medical and psychiatric reports which are never made public. In some cases, the employees who are dismissed never get a chance to see the governmental reports which were the basis of their dismissals.

Evidence gathered by the American Federation of Government Employees indicates widespread rigging of medical records as grounds for firing Foreign Service Officers. The report said the State Department isn't the only government department engaged in this practice. And I can say from personal experience that it's rather widespread.

Recent reports of two other groups have corroborated the use of false documentation in connection with unfair arbitrary action by personnel officers, and the absence of effective grievance procedures to even obtain access to force correction of the rigged records.

One of the other reports is by liberal crusader Ralph Nader's group. It goes into the Civil Service Commission, which I mentioned a little earlier.

The other is by a subcommittee of the traditionally conservative American Bar Association.

Senator Eagleton admitted his mental problem and voluntarily sought medical help. He at least has been in control of access to his own medical records.

But what about the secret anguish of the dozens of government employees who are dismissed every year through the misuse or false or overdrawn government reports on various types of mental problems. Frequently, employees are denied access to their own medical reports. They are forced out of government without hearings, or in secret hearings.

Deputy Under Secretary of State William Macomber, who has been in charge of departmental personnel administration for the last 3 years, prior to the time I made mention of this in a column, has opposed enactment of legislation which would guarantee public hearings for Foreign Service Officers, the right to call witnesses and examine records, and the right to a truly independent hearing board that would not be under the control of Macomber's office.

The opposition by Macomber has been in the face of testimony before congressional committees which mirrored deep unrest and outrage of dozens of Foreign Service officers, and the major employees' organizations involved.

The evidence has been convincing the Democrats and Republicans, ranging from such liberals as Senator Birch Bayh and Senator Humphrey, to Congressman Gross and Congressman Ashbrook.

Also, when a Government employees union, a group headed by Ralph Nader, and the ABA, are playing essentially the same tune, it is reasonably certain that the conclusions are not based upon ideological or partisan considerations.

Nader's report on the lack of due process for Federal employees encompassed the entire Government, including the Civil Service Commission. In general, it concluded that there was widespread falsification of records and perjury involved in the firing of civil servants who displeased their superiors.

Nader's group also noted a lack of open hearings and procedural safeguards for employees who wished to challenge the wrongful and illegal actions of their superiors.

Nader concluded that the Civil Service Commission Chairman Robert Hampton and his predecessors had let the Civil Service Commission itself deteriorate into a bureaucratic jungle that served more as a protector of the governmental establishment than as a mechanism to give protection to Government employees.

The subcommittee of the conservative ABA investigated only the State Department, but found "a grim record" that appeared "a consistent, deliberate policy of denying to Foreign Service officers and employees the right to a hearing of their grievances by an impartial hearing officer or panel."

Following the Hemenway hearing throughout, I saw a pattern that Macomber seemed to be dominating, where he was seeking to

keep a control of what was eventually going to happen within his own shop.

And it's comparable to Mr. Richardson's insistence upon final authority—in quotes—on the investigation and prosecution in the Watergate matter even though he will be naming a so-called independent special prosecutor.

Mr. Macomber kept the same kind of a string on, and I have an idea that the very able and clever Mr. Richardson has in mind keeping the same string on. In fact, he stated as much before the committee. His reason is that he, as Attorney General, could not think in terms of giving up this basic responsibility over the investigation.

But in the end, I have no faith that Richardson will be any better than Patrick Gray or John Dean, if the press isn't watching every move that he makes, because his record at the Defense Department, where he had some responsibility in connection with the *Fitzgerald* case in the last crucial months, and at the State Department in the earlier period of time, is without any redeeming features.

The ABA report noted that a former State Department personnel officer admitted several hundred grievance cases arose during his 7-year tenure and that "a hearing was granted in only one case." That hearing was granted only as a result of White House intervention.

And I quote:

Not only have these deprivations—of due process—violated the legal rights and dignity of the individuals involved, causing them untold personal anguish and suffering, and, in some cases, tragedy, but they have inhibited, if not crippled, the efficiency, and effectiveness, and morale of the Foreign Service, a key instrument, if not the mainstay, in the front-line defense of the United States in the field of foreign relations and diplomacy.

The ABS report concluded the "personal vulnerability and feeling of career insecurity" resulting from the lack of due process has allowed vigorous, creative, imaginative, and competent Foreign Service officers to be muzzled and their contributions to the substantive work of the Department unduly suppressed, censored, distorted, or unfairly reported.

The report continued:

At the same time, unfair and injudicious critical performance reports have been placed in the pertinent individual's personal file with impunity, to the everlasting detriment and in some cases the destruction of the career involved.

The ABA commented caustically that Macomber's administrative reforms put forward as substitute for the new legislation:

Fail to provide such basic guarantees as the right to a hearing, the right to representation at all stages of the proceeding, the right to a transcript of the hearing, the right of access to documents relevant to a grievant's case, the right to call witnesses under the Department's supervision or control, and to cross-examine witnesses.

The ABS noted "a further serious deficiency" in Macomber's procedures in the "lack of assurance of an independent board or panel as the hearing forum." It noted that Macomber's office would have a role in selecting all of the outside members of the panel, and that others would be selected from employee groups directly under his authority and control.

On balance, and in view of all the background and circumstances of the long and excruciating struggle of Foreign Service officers and

employees to secure fair, just, impartial and even-handed consideration of their grievances, it would be almost unconscionable to further delay guaranteeing to these deserving public servants the fundamental elements of administrative due process to which, under law, they are entitled, but of which they have been wrongfully deprived for too long already.

Viewing it in perspective, Senator Eagleton has at least had the opportunity to have his case weighed in public.

Contrast this with the secret tribunals that have taken place in recent years in the State Department where personnel specialists have denied hundreds of employees the basic right to a grievance hearing, and secreted documents in many cases that would have revealed the serious rigging of records.

Even when the wronged employees sought publicity on their cases, little more than a whimper got through to the public. Without a right to records and a public hearing, it was largely the word of a high State Department official against what was usually pictured as a "disgruntled and slightly unbalanced" chronic malcontent.

Press inquiries into such cases are usually met with a bureaucratic admonition that "a mental problem" is involved, and requests for specific proof on the "mental problem" is always met with an explanation that such medical records are "confidential, for the protection of the employee."

Senator Eagleton was fortunate he didn't have such "protection" from a big brother personnel office.

And I might say that, in listening to the last part of Mr. Drummond's testimony here, he states:

In conducting investigations and deciding on fitness for employment, the Commission's concern throughout is to protect the legitimate interests of the Government, without impinging needlessly on the rights of the individual. We therefore strive constantly to arrive at equitable decisions based on established facts, not on raw data, hearsay, suspicions, or unfounded allegations.

I say that is an inaccurate statement on the basis of my work on civil service cases over a period of the last 20 years. Obvious rigging of records, obvious injustices, are not corrected by the Civil Service Commission. They claim on all of these legal quibbling matters that they don't have jurisdiction in this case or that it is still in the administrative stage in the agency.

I noted that Mr. Mondello said that personnel selection is not a science. I might say that the efforts to make it a science through the personality assessments that the Civil Service Commission and the various agencies have gone through is not a science either, nor even in most cases is it an effort to be fair in coming to grips with the individual cases.

Those devices are usually taken and warped into another tool for the personnel managers to beat the heads of the dissenters in the agencies.

And this would be true essentially across the whole rack of cases that I have gone into here, in one respect or another.

I will be very happy to answer any of your questions relative to this. I do have some columns that I did over a period of the last couple of years that deal in some detail with this.

Mr. WALDIE. With the cases you mentioned?

Mr. MOLLENHOFF. With those cases.

Mr. WALDIE. Thank you.

Mr. MOLLENHOFF. I am also trying to get from Ron Ziegler's office an explanation of whether the President knows about Richardson's responsibilities in the *Fitzgerald* case, and whether he has gone into his responsibility with regard to this whole administrative mess in the personnel section of the State Department.

Abandoning executive privilege for the moment, which I usually do, I might say that I had some contact with the *Hemenway* case when I was special counsel to the President. I sent it to Richardson's shop to have it examined.

I was surprised. Although he assured me he would take a personal interest in this, he turned it over to his assistant, Jonathan Moore, and Jonathan Moore turned it over to the very hatchetmen in the European Division who had been responsible for the selection out of Hemenway in the first place.

It was a thoroughly inadequate resolution of the problem. The agency itself engaged in falsification of records, perjury, condoning perjury and what is generally regarded as obstruction of justice.

Mr. WALDIE. May I interrupt you a moment?

Mr. MOLLENHOFF. Yes, sir.

Mr. WALDIE. Is this the span of time that was covered by the ABA investigation?

Mr. MOLLENHOFF. Their investigation was in the period, covering the period just prior to last summer.

Mr. WALDIE. And the ABA investigation came up with a very adverse determination?

Mr. MOLLENHOFF. Adverse determination about State's procedures.

Mr. WALDIE. Yes; and that is available to us, and I have not gotten that; you mentioned that, and the committee will get that.

My speculation is that if the ABA was investigating a defective evaluation program on the part of the State Department, which I understand the Civil Service Commission has left on their own, but evaluates, it would be interesting to compare the evaluation the Civil Service Commission gave to the State Department program at the same time the ABS study was being conducted.

Mr. MOLLENHOFF. I have the same regard for Civil Service Commission investigations of the Civil Service Commission or the various executive establishments that I had last fall for Pat Gray, and that was before I found out he was involved in evidence indicating an obstruction of justice. That was when I thought Gray was a clean guy.

Mr. WALDIE. You will permit, however, this member of the committee, at least, to reserve those kinds of judgments until a later day.

Mr. MOLLENHOFF. I understand your desire to remain in a judicial position until the very end. You will pardon me for having some sharp conclusions about this as a result of 20 years of trying to get justice out of the Civil Service Commission under Democratic and Republican administrations.

Mr. WALDIE. I understand that, and I do not intend my comment to imply any criticism.

Mr. Wilson?

Mr. WILSON. Thank you, Mr. Chairman. Mr. Mollenhoff, is the *Hemenway* case you refer to—are there two *Hemenways*?

Mr. MOLLENIHOFF. John D. Hemenway.

Mr. WILSON. And he is the one recently dropped by the Department of Defense?

Mr. MOLLENIHOFF. That's correct. I wrote a column on that. And I think it is available to the committee, and I would like to have it put in the record, because I think I set out as well there and as clearly—

Mr. WILSON. But he had previously been with the State Department?

Mr. MOLLENIHOFF. That's right. He had moved. He moved in September 1969, from the State Department to the Defense Department.

The efforts that I made from the White House to get Richardson to deal with this thing in a fair manner were futile, and he recognized that, and that they were dragging their feet. I discussed with Mel Laird the possibility of something being done at the Defense Department to use Hemenway's talents, because this is a highly intelligent man.

He was one of the top members of his class at Annapolis; he was a Rhodes Scholar; is fluent in German and Russian. He is the type of man that you would think the Government, the State Department, or the Defense Department, would be searching for. Similarly Ernest Fitzgerald is the kind of cost analyst that you would think that the Air Force and Defense Department needed, and that I know they need, and yet he was cut adrift with a RIF explanation. I knew from personal experience, again, that was a phoney explanation.

I went through the whole Fitzgerald case in some Civil Service hearings—and I would prefer not to go through it again, unless you want to ask me specific questions on that.

Mr. WILSON. Well, I was just trying to identify the man, because it seemed that the time that we were talking about went beyond the time he was in Defense, and apparently Richardson's responsibility prior to the time he was Secretary of Defense.

Mr. MOLLENIHOFF. Richardson was in the State Department number two spot with general responsibility for personnel administration from January of 1969 up until the summer of 1970, and this would have been the crucial period of time on a number of cases—the *Hemenway* case, the *Charles W. Thomas* case, the *Allison Palmer* case.

Now the fact that Richardson just kicked these down and let Bill Macomber handle them in any way that suited his fancy, is no excuse.

In the *Hemenway* case, I know that I called it to his personal attention, and that he assured me that he would take a personal look at it, and would follow through on it.

Mr. WILSON. Well, I might say that a majority of the members of the Armed Services Committee were happy to see him leave as Secretary of Defense, also, for different reasons.

Mr. MOLLENIHOFF. Well, I understood that, and there were a lot of

people at the Defense Department who were happy to see him leave there.

Mr. WILSON. In your opinion, Clark, do you feel that the Bureau of Personnel Investigations is a necessary bureau? Are they doing something that could just as easily be done by the agencies themselves, or is there a need for an agency such as this to coordinate investigative work?

Mr. MOLLENHOFF. Well, I have not looked into that question specifically, and I think that there is an awful lot of overlapping in many of these things. I would think that if the agencies were doing anything like a competent job, that you would not have the need for the Civil Service Commission. The real function of the Civil Service Commission in most of these cases would be to simply give a stinger to the agencies if they were not doing a competent job, and not to have to review every blessed thing that comes through.

Mr. WILSON. Mr. Chairman, I have no other questions. I want to commend Mr. Mollenhoff for coming before the Committee. He certainly has given us a lot of material to think about, and I think it's been very helpful. Thank you.

Mr. WALDIE. Mr. Hillis?

Mr. HILLIS. Mr. Mollenhoff, all I know about the case involving Mr. Fitzgerald is what I read in the press, but I do remember that you appeared as a witness at one of the Civil Service hearings and were denied the right to testify.

Could you fill us in on the record of what went on there?

Mr. MOLLENHOFF. Well, I was reluctant to make my information available to Ernie Fitzgerald, because I had obtained it as Special Counsel to the President. There was nothing confidential about it, except that I was in a Government position. I tried, as I have in dealing with other cases over a period of years, not to go into the things that I knew as Special Counsel, to keep them separated from those things that are in the public domain, or that I might have learned directly from Mr. Fitzgerald or his lawyers.

In February 1973 I came to the conclusion that the administration was not going to straighten out the *Fitzgerald* case. The hearing was coming to a close. So I wrote the President of the United States, telling him that these are what the facts are, this is an injustice. "I told you it was an injustice when I was your Special Counsel. It's been dragging on now for 3 years. It still isn't resolved. And I am going to be compelled to testify, if it is necessary, to look out for the rights of Ernie Fitzgerald, that he has all of the evidence."

Then, in response to that letter, the President had John Dean get into the case. That was before he became so notorious. John Dean got into the case, and in a brief period of time concluded that they were going to let it go but he did not want me to testify.

And in the course of that conversation—it's kind of amusing now—he said, "Have you thought out this business of whether it would be proper for you to testify as Special Counsel to the President of the United States?"

And I said:

Yes, John, I have gone into this very thoroughly, and I know there isn't any way you can stop me, or the President can stop me, from testifying before that Civil Service Commission if they will hear me.

But then the Air Force tried to impose an executive privilege on me. And I wasn't about to accept the executive privilege. I wanted to get the facts on the line.

In the *Fitzgerald* case, I felt there has been a serious abuse, and I knew the facts personally. And despite the fact that there was a very biased hearing examiner, Herman Staiman—I'd like to mention him by name—

Mr. HILLIS. This is on the Civil Service level?

Mr. MOLLENHOFF. He is the Chief Hearing Examiner at the Civil Service Commission, and I can say frankly that he is biased, because I told him to his face during the hearing.

And I base that upon the view that he held about a closed hearing—he was insisting on a closed hearing—and that his rulings throughout the hearings had been obviously for the Air Force.

And even through the period of time that I was testifying, even though he permitted me to testify, Staiman did not conduct himself in an objective and even-handed way. He was thoroughly biased and I informed him of such during the hearings.

Mr. HILLIS. Were you denied the right to testify?

Mr. MOLLENHOFF. I testified. And I produced all of the White House communications—my communications to the President and my communications to Bryce Harlow, and others, when I was in the process of trying to get this thing resolved, because they were important to the case. I arrived at a conclusion in late November and early December of 1969 that the Air Force was trying to rig a record against Ernie Fitzgerald, and to smear him with unfounded charges that he was a security risk and that he had a conflict of interest.

I didn't know how poorly founded those charges were until months later. I just knew that when I made the inquiries of the Air Force at that stage, the Air Force representatives who came to see me at the White House just engaged in a conspiratorial whisper, to start with, that there was something wrong with Fitzgerald, that it was a security thing, and it was a conflict of interest.

And then as I pressed them, it became apparent to me that they didn't have anything to back it up. Their idea of a security violation was Fitzgerald's testimony before the Proxmire Committee when they contended that he had leaked material to Proxmire.

Mr. WALDIE. May I interrupt you just a moment? We are in the middle of a quorum call. I am perfectly willing Mr. Hillis, to come back, if your schedule will permit, and if Mr. Mollenhoff can come back.

Mr. MOLLENHOFF. I would prefer—I am a working newspaperman, and I would prefer to come back at some later stage, and preferably at 8:30 or 9 o'clock in the morning, because I like to get these things out of the way early.

Mr. HILLIS. I'd like to go into this further, Mr. Chairman. I think it goes to the heart of what we are trying to do.

Mr. WALDIE. Do you want to continue until the second bells ring?

Mr. HILLIS. Perhaps we can just schedule another time.

Mr. MOLLENHOFF. I think probably there's enough in the record here now that you'll have a difficult time assimilating it. I have some additional columns I will leave.

Mr. WALDIE. We will schedule you for another appearance.

Mr. MOLLENHOFF. One thing, for the record at this stage is these documents. One is the inadequate explanation from the Defense Department relative to Richardson's handling of the Hemenway matter, and his responsibilities in connection with the Fitzgerald matter.

Mr. WALDIE. I wonder if it would be all right if you would hold those until the next meeting. Or is there some particular reason, for continuity of the record, to put them in right now?

Mr. MOLLENHOFF. Well, I made reference to them, and they can go in the record now or later.

Mr. WALDIE. Let's hold it until later, if it's okay. I think copies ought to be given the committee, so we have a chance to look at them.

Let me say, Mr. Drummond and Mr. Mondello, since both of you—particularly Mr. Mondello—were mentioned in the testimony that was given, with some critical observations, if you desire to respond you can either do so by writing or at the next committee hearing, whichever you prefer.

Mr. MONDELLO. I'd like the opportunity.

Mr. WALDIE. Fine.

Mr. MOLLENHOFF. I want to be present when it takes place.

Mr. MONDELLO. He is offering that I can come and join you.

Mr. MOLLENHOFF. I want that, because I have a lot of things to straighten out with you.

Mr. WALDIE. We will schedule that, Mr. Mondello.

Thank you, gentlemen.

[Whereupon, at 12:15 p.m., the hearing was recessed, to be resumed at the call of the Chair.]

RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

MONDAY, JUNE 4, 1973

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 9:35 a.m., in room 210, Cannon House Office Building, Hon. Jerome R. Waldie (chairman of the subcommittee) presiding.

Mr. WALDIE. The subcommittee will come to order.

We will continue the hearings that were commenced involving the invasion of privacy of Federal employees, with the testimony of Mr. Clark Mollenhoff, chief of the Washington bureau of the Des Moines Register, and former Special Counsel to the President. At the conclusion of his testimony we will then call Mr. Mondello, General Counsel of the Civil Service Commission, to respond to remarks that involve the Civil Service Commission's practices and accusations made against the Commission, and to take Mr. Mondello's testimony. At the conclusion of Mr. Mondello's testimony, Mr. Mollenhoff will be given an opportunity to rebut if he so desires.

Will you please proceed.

STATEMENT OF CLARK MOLLENHOFF, CHIEF, WASHINGTON, D.C., BUREAU, DES MOINES REGISTER

Mr. MOLLENHOFF. Thank you, Mr. Chairman.

I am delighted to have this opportunity to be here and to have Mr. Mondello here. It isn't that I believe that Mr. Mondello is responsible for all of the ills of the Civil Service Commission, but as General Counsel he has the responsibility, and he can associate himself here with whatever part of Gestapo mentality that has permeated the Civil Service Commission that he wants. He can disassociate himself from those cases too.

At the last meeting of this subcommittee I stated that the Civil Service Commission is not a protector of the rights of Government employees, but has been turned into a tool for locking in the injustices of the various Government bureaucracies, and I repeat that today.

What we are seeing unveiled in the Watergate hearings on the misuse and abuse of Government power and authority is only a duplication of what has been permitted by the Civil Service Commission for years in its bureaucratic support of the many little arrogant bureaucracies that run the vital personnel offices in various agencies.

(95)

The Civil Service Commission has been involved in the obstruction of justice in much the same manner as the White House has been involved in the Watergate case.

Robert Vaughn, now a professor at American University Law School, did a massive study for Ralph Nader entitled "The Spoiled System." That study documented in considerable detail the problems I have found in dealing with the Civil Service Commission over a period of more than 20 years in Washington.

In working to correct injustices in dozens of cases over that period of time, I have found this to be the situation without regard for the political party in power or the ideological bent of Democratic and Republican Presidents.

The members of the Civil Service Commission and the employees of that agency do not regard themselves as defenders of the rights of individual Government employees, but consider themselves to be in an alliance with various personnel offices for the defense of the bureaucratic establishment.

The various personnel offices operate with the confidence that they will be able to beat down most wronged employees, confuse the issue, or manage to coverup with the aid of the Civil Service Commission.

With a record of success in perpetrating injustices, the various personnel offices have become more arrogant, more arbitrary, and more confident in recent years that they can rig the records, condone perjury, and use questionable or false psychiatric reports to destroy the individual government employees who oppose them.

The members of the Civil Service Commission, the executive Directors of the Commission, the chief hearing examiner, and even the general counsel, have been parties to obstruction of justice no less serious than the White House efforts to misuse its authority over the CIA to limit or control crucial aspects of the Watergate probe by the FBI.

There are literally dozens of cases that I could explore with Mr. Mondello today, but I believe that this would only confuse the issue, and that confusion has been the major weapon of the Civil Service Commission and the various personnel offices in the past. (The subcommittee may find it beneficial to make an extensive study of the Nader report written by Robert Vaughn. It covers a good many cases with considerable technical detail. I will also make mention of a number of other cases that can best be explored by questioning the government employees on the injustices perpetrated by the Civil Service Commission and other agencies. I believe that this can best be done with Chairman Hampton, other commissioners, and General Counsel Mondello present in the hearing room so that the issues can be resolved at a joint meeting.

For a moment I would simply like to explore three cases that demonstrate the injustices and the attitude of the Civil Service Commission. All of the cases have been under study for years which makes it possible for us to draw some sharp conclusions about the system that has been inflicting injustices, condoning perjury, and taking part in the coverup over many years.

It will also permit us to draw a few more limited conclusions on the role of specific Civil Service Commission officials in a few cases.

The case of A. Ernest Fitzgerald, the former Air Force cost analyst, gives us one of our clearest examples of Civil Service Commission disregard for due process of law, and what must be a blind lack of understanding of the importance of public hearings in all cases in which the Government employee waives his right to a closed hearing.

On this fundamental injustice, the active participants included Chairman Robert Hampton, Chief Civil Service Hearing Examiner Herman Staiman, and General Counsel Anthony Mondello. I know that there are other government officials who have some responsibility for the closed hearing or for the attempt to close those hearings, which Staiman tried to impose upon Fitzgerald, but for the moment it should be enough to identify three of the culprits—Hampton, Staiman, and Mondello. I had personal contact with all three of them during this period of controversy.

Staiman was the official who initially rejected Fitzgerald's plea for an open hearing which would have pulled the Air Force officials into the open for their testimony so that the public and the press could observe their demeanor on the witness stand as they answered, evaded, or refused to answer questions. By his arbitrary decisions on what testimony and comments by lawyers and witnesses would be recorded, Chief Hearing Examiner Staiman had a strong control over what would be made a part of the official record, and what facts would be a part of the record that could be appealed.

I would not seek to hold Mr. Mondello responsible for Staiman's conduct of the hearing except on the point of the closed hearing that was imposed upon Fitzgerald. I had conversations with Mr. Mondello on the injustices of a closed hearing when Fitzgerald did not want it. I argued with him that the provisions for closed hearings were to protect the government employee, not to protect the government establishment.

Mr. Mondello argued vehemently that a closed hearing, away from the confusion of the press and the public, was the best way to get to the truth in personnel cases. I pointed out the absurdity of such a position, and predicted that the courts would reject his thesis.

I later argued with Chairman Hampton that a closed hearing for Fitzgerald was not "due process of law," but represented a willing participation in an Air Force coverup, and was a perpetration of an injustice on Fitzgerald for actions that took place on the C-5A transport contract prior to the time that President Nixon took office. It was to no avail. They remained adamant in their position.

After saying he would restudy the issue, Chairman Hampton signed a letter to Senator William Proxmire which stated his view that the law did not require an open hearing for government employees if the agency wanted a closed hearing. I am informed that Mr. Mondello had a hand in the writing of that letter.

At this juncture I would be interested in hearing anything that Mr. Mondello has to say for himself or for his agency in supporting the Staiman ruling that Fitzgerald's case could be adjudicated in a star chamber proceedings.

Keep in mind that Fitzgerald did receive an open hearing early this year, but only after both the United States District Court

(Judge William Bryant) and a unanimous United States Court of Appeals panel ruled that a closed hearing did not meet the standard of "due process of law" required in personnel cases.

Fitzgerald was represented by two particularly able lawyers, John Bodner and William Sollee, and had the backing of the American Civil Liberties Union in his case. It is doubtful if he could have afforded the long appeal process necessary to upset Staiman's ruling that the hearings would be closed. In this instance it should have been apparent to Mr. Mondello, and it should have been apparent to Chairman Hampton initially, that this was a wrong ruling unless they had this Watergate mentality, Gestapo mentality, that had permeated so much of the government.

Mr. WALDIE. May I interrupt you a moment. I will also ask Mr. Mondello, but perhaps you could tell me. Has the practice of closed hearings been engaged in by the Civil Service Commission prior to this court decision? Is this the first time a practice was challenged?

Mr. MOLLENHOFF. It was my understanding that there was a right to a closed hearing. If the employee wanted an open hearing he could have it. That was the only thing that made sense, and it is what the court has ruled now. It is the only just thing. I would be interested in Mr. Mondello discussing this right here.

Mr. WALDIE. The procedure will be, we will have yours and then we will ask him those questions, and that will be one of them.

Did I understand that, as far as you know, the practice for the employee to seek an open hearing, the practice in the past was to grant him that open hearing prior to the *Fitzgerald* case?

Mr. MOLLENHOFF. It was my understanding that it was. There is no question that that would be the fair procedure.

Mr. WALDIE. What I am trying to find out—and I will ask Mr. Mondello—if this court decision refers to a practice that was of long standing within the Civil Service Commission. What I am trying to find out is, was this a practice that was engaged in just by this Commission, therefore giving some substance to your accusation that this is a peculiar action, or is this a practice that has been engaged in before?

Mr. MOLLENHOFF. I am not saying it is a peculiar action by the Commission. In the 20 years that I have been in this town, the Civil Service Commission has always been a political institution defending the establishment. It has only become worse in recent years.

Mr. WALDIE. No question about that, but you used charges such as Gestapo-type tactics—

Mr. MOLLENHOFF. Gestapo mentality. In the closed hearing—

Mr. WALDIE [continuing]. And engaging in the obstruction of justice.

Mr. MOLLENHOFF. Obstruction of justice means putting procedural difficulties in the way of the truth.

Mr. WALDIE. OK. I want you to define these terms because these terms are generally understood to mean other things by different people. In your view the opposition to Mr. Fitzgerald's request for an open hearing was a Gestapo tactic?

Mr. MOLLENHOFF. Gestapo manifestation of Gestapo mentality.

Mr. WALDIE. My further question is, is it your conviction that this

Gestapo mentality has been pervasive in the Civil Service over the years, or was it just with this Commission?

Mr. MOLLENHOFF. To a degree, over the years. I have never seen a situation where there was this defense of a closed hearing, where the employee did not want the closed hearing in the past. There may be another situation like that, I don't know.

Mr. WALDIE. I presume in the past, as far as you know, if an employee sought an open hearing he was granted it.

Mr. MOLLENHOFF. Yes.

Mr. WALDIE. Mr. Hillis, do you want to question him at this point?

Mr. HILLIS. Not at this point.

Mr. MOLLENHOFF. I am told that the Civil Service Commission wanted to appeal the appeal court's ruling for Fitzgerald, but that the Solicitor General's office of the Justice Department rejected this idea. I would be interested in Mr. Mondello's discussion and comments on his personal views of closed hearings, and on any discussions he had with Chairman Hampton, or Staiman, or the Air Force lawyers relating to the decisions on closed hearings and the decision to appeal the lower court's ruling for Fitzgerald. It is, I believe relevant to a state of mind at the Commission relating to the rights—or I might say lack of rights—of individual Government employees. I see it as an obstruction of justice that can be justified only by the distorted type of thinking that brought us the Watergate scandal.

The case of Kenneth Cook ended last January 10. Cook, a 59-year-old weapons analyst, dropped dead in a Washington department store. He was penniless and ragged at the time of his death, and had been spending most of his time for the last 2 or 3 years seeking justice from the Civil Service Commission, and in my office week after week after week explaining his case.

Kenneth Cook was killed by the Air Force, but the Civil Service Commission was an accessory to the breaking and death of this man. I saw him deteriorate over a period of 2 or 3 years in his futile fight.

Cook was the victim of what many call the medical trap. As a result of his dispute with his superiors at an Air Force base in New Mexico, Kenneth Cook was told by his commanding officer to report to the base doctor. The base doctor, a friend of the commanding officer, made an examination of Cook and made a report that Cook was suffering from mental disability making it impossible for him to continue in his Air Force job as a weapons analyst. Steps were taken to oust him, and he was ousted.

The weapons analyst fought the decision, and in the process visited qualified psychiatrists; their reports stated that he did not suffer from a mental disability and that the base doctor's reports were wrong. After months of appeals to the Air Force System and the Civil Service System, Cook's appeals were rejected. He was forced to retire on a pension of \$300 a month.

Cook wanted his job back. Most of all he wanted the brand of "mental disability" lifted. In the course of events the chief psychiatrist of the Air Force made a decision, or wrote an opinion, that the initial decision by the base doctor had no support in any evidence in the file. With that, the strongest evidence possible—the top Air Force psychiatrist saying that the initial decision was based on a

wrong analysis, and by a man not necessarily qualified—Cook was still unable to get a reversal of the decision.

I made a number of calls to the Air Force and to the Civil Service Commission. They would engage in a type of bureaucratic gobble-dygook passing the responsibility back and forth. It always had to be initiated someplace else. It was too much for me to follow through on. Cook was doing what he could about it. There were two or three Senators and Congressmen who wrote to the Commission and to the Air Force, and got back erroneous, inaccurate explanations.

I tried to stimulate a Civil Service Commission investigation of the initial finding to get a determination of how the record was rigged against Cook in the first place or whether it was simply an unqualified medical doctor invading a field where he had no expertise and making a wrong judgment. It was futile. The bureaucratic jargon of the Civil Service Commission indicated little concern for justice and injustice, little concern for rights and wrongs.

The case of Otto Otepka stands as a case of massive injustice.

Mr. WALDIE. May I interrupt you a moment. Do I gather that the case of Mr. Cook is the one that you are using to justify your charge of medical records being—how do you phrase it?

Mr. MOLLENHOFF. Medical records being rigged. That the Civil Service Commission here had the opportunity to investigate that and to go all the way, and didn't do it.

Mr. WALDIE. But this is the case to justify—

Mr. MOLLENHOFF. That is correct. You have a finding—there are many others. Don't get me wrong. This is a specific case that is over a long enough period of time where there are clear cut decisions—here you have the top Air Force psychiatrist making a finding that the initial decision was wrong. Here you have a number of medical doctors, psychiatrists, hired by Cook privately, saying that the initial decision was wrong, and then you have the Air Force bureaucracy, bent at that time on making specific judgment on the ABM, wanting to take and distort Mr. Cook's weapon analyst's report.

Mr. WALDIE. The question that I want to ask you is, you said there were two possibilities on the initial medical report, one was along the line that this man was unqualified. There were two possibilities, one that the doctor was doing the man a favor and therefore that would be a rigged medical report, or that he was incompetent, and that the report was beyond his own expertise.

Mr. MOLLENHOFF. That is correct.

Mr. WALDIE. Which conclusion did you arrive at?

Mr. MOLLENHOFF. I did not have the facility for going into this. I would think the committee could go into that at this stage. The Civil Service Commission did not take the stand—

Mr. WALDIE. At this point you at least are not in a position to conclude this was a rigged medical report.

Mr. MOLLENHOFF. I can conclude that the mere fact it continued for this period of time indicates to me that it was a rigged medical report because if it was not rigged initially, at a later stage the Air Force bureaucracy persisted, and that meant a rigging.

Mr. WALDIE. If I understand you correctly the Chief psychiatrist said that was an erroneous report.

Mr. MOLLENHOFF. That is correct, but the Air Force refused to go back and correct it, and the Civil Service Commission, which had a responsibility, if the Air Force was not performing properly, to get into this, did not get into it. It is the futility of the individual employees fighting this system that is rigged against them.

Mr. HILLIS. Was this the sole base of Mr. Cook's suspension?

Mr. MOLLENHOFF. That is correct.

Mr. HILLIS. This was set aside then. It had no grounds.

Mr. MOLLENHOFF. There were no grounds. Let me say this: During the first hearing I had one of the Air Force lawyers come up to me and say that there were some other things about Cook, some acts that he performed after that, that would have made it difficult to—there were some threats that he was supposed to have made to the base officer after the point where he was charged with this disability, but that was only whisper. I don't know whether there is anything to that or not.

It is the same as the case of Ernest Fitzgerald. There was a whisper that he is a national security problem, that he has got a conflict of interest. When I was in the White House and asked the questions and followed through, I was able to make a determination for myself that there wasn't a damn thing to it which was in line with what the Air Force had arrived at—even months before their top officials were at the White House smearing Fitzgerald as a security risk or a possible security risk, smearing Fitzgerald as having possible conflict of interest. You know what it is. They come around and tell Congressmen periodically—in that case they were around telling members of the Armed Services Committee top Air Force officials that they shouldn't get involved in the *Fitzgerald* case because there was something they couldn't say that was not part of the record. That is the part of the "Gestapo mentality" that has no part in this country. If you can't make a case on the record you have no business throwing the man out.

Mr. HILLIS. As I remember the press reports I read, you were initially denied the right to testify, or Fitzgerald was denied the right to call you as a witness. Can you explain that feature?

Mr. MOLLENHOFF. I can't understand—I can tell you what happened.

I tried to testify or told Fitzgerald I would be available to testify for him because I had information that was highly material to his case. The White House had refused for an extended period of time to straighten this matter out. When Fitzgerald's lawyers mentioned me by name as a possible witness, there was an objection from the Air Force; the Air Force was trying to impose an executive privilege on me. Again, this is an extension of that silly White House memo on executive privilege that went out on March 12 saying that everybody who was ever in the executive branch of the Government could be put under this cloak.

It should have been obvious to Herman Staiman, the hearing examiner, the day it was raised, that there was no validity to it. If I wanted to testify and I had information that was relevant to the hearing and the injustice perpetrated on Ernest Fitzgerald by the Air Force, there should have been a right to testify. But here the

Air Force was imposing upon me an executive privilege, and Herman Staiman, after a period of about a week, finally agreed to let me testify.

Mr. WALDIE. I want to interrupt you a moment so that the record is perfectly clear.

Mr. Fitzgerald is employed by our committee as a consultant, and you know that.

Mr. MOLLENHOFF. Yes, sir, I understand that.

Mr. WALDIE. I think our records ought to reflect he is an employee of the committee and we have employed him with the confidence that was not shared by the Air Force, so that our questions should perhaps be geared in that light.

Mr. MOLLENHOFF. I might say that the Air Force, in its testimony before the Civil Service Commission, was stating what a wonderful employee Fitzgerald was, and how there wasn't anything on his record that was derogatory, and how their investigations in the summer of 1969 had cleared him absolutely, and yet they discharged him.

Mr. WALDIE. I had not intended to initiate the *Fitzgerald* case, but you cited it as one of your examples, and Mr. Hillis and I discussed it and decided we would not initiate it, but if it came up we would discuss it.

Now, I want to open up a line of questions involving the *Fitzgerald* case, and one of the questions is I am puzzled by the statement of the President at one time during the *Fitzgerald* case to the effect that—I think it was published that what the President said was he ought to be thrown out or something of that nature.

Mr. MOLLENHOFF. In the January 31, 1973 press conference, the President, boxed into a corner by my questioning, said that he had personally made the decision to fire Fitzgerald. It wasn't one of the underlings. He meant it and he was going to stick by it. The next day Ron Ziegler came out and said the President had misspoken. I was aware the President had misspoken at the time he said it because I was very much involved in the *Fitzgerald* case when I was at the White House.

Mr. WALDIE. Did he say the President had misspoken and followed it up and said the President knew nothing about the *Fitzgerald* case?

Mr. MOLLENHOFF. His comments were the usual vague and fuzzy comments.

Mr. WALDIE. Did he say it was an inoperative statement?

Mr. MOLLENHOFF. I am sure it was the effect of an inoperative statement. He wouldn't answer detailed questions on that.

Mr. WALDIE. Have you ever discussed this case with the President?

Mr. MOLLENHOFF. I had sent memorandums to the President and to his top people, which are a part of the Civil Service hearing. I had a conversation on November 13, 1969, with two Air Force officials at the White House, and they were to get back a report on the Fitzgerald security problems and so forth within a day or two, and I held up a report to the President pending that.

On November 17, which was a Monday, I called Bryce Harlowe and talked to him about this and also sent a memorandum to the President saying, "This case is going to give you a bad time, and you had better get into it and straighten it out because the Air Force

was rigging the record.— I don't remember whether it was in that memorandum or one of the subsequent memoranda where I said that. I could come to no other conclusion.

Mr. WALDIE. You said that?

Mr. MOLLENIHOFF. I said that and the same general statement was made in a number of other memoranda which would have gone through Haldeman. Some of them were addressed to John Ehrlichman during that period of time, and initially, because of the political problem that it raised, they exhibited some concern. But after the President had handled this with a brushoff in a press conference, they thought they had taken care of it, and then they became rather adamant in opposing any correction, with no regard for the rights and wrongs. It was simply a matter of whether it was going to be politically tenable to fire Fitzgerald.

Mr. WALDIE. In your investigation of the *Fitzgerald* case, while you were attached to the White House staff, did you have access to records that normally would not be accessible to individuals other than White House personnel? Did you have access, for example, to the personnel records of a confidential nature, or Internal Revenue records—

Mr. MOLLENIHOFF. Normally, I would have on request, but usually it was not necessary to do that. You have a specific issue before you, and in this particular case it was relatively easy to make a decision. The Air Force people had come over and had said they were engaged in a rift with Fitzgerald, but that there was really a case that could be made against him on the grounds of security and conflict of interests. At the point where they couldn't make the conflict of interests and security stand up, I knew that their best shot was no good and so it was not necessary to go further.

Mr. WALDIE. I am not leaving the *Fitzgerald* case but I want to go beyond that in terms of the issue of privacy with which this committee is concerned.

Do I understand your testimony to be that as a member of the White House staff the restraints of confidentiality that are imposed by law are not in fact restraints upon the members of the White House staff? Can you get access to all Internal Revenue Service files?

Mr. MOLLENIHOFF. I was able to get access to the Internal Revenue Service files—

Mr. WALDIE. What would be the process?

Mr. MOLLENIHOFF. The process, not followed in the past, was that there had been no restrictions at all on the President, or someone representing the President, obtaining Internal Revenue Service files.

Mr. WALDIE. What would they do?

Mr. MOLLENIHOFF. Call and have them sent over. There was no need to make a record. I sat down with Commissioner Throlan at the time because my job was Presidential ombudsman, and this entailed examination of the qualifications of individuals that were being appointed by the administration. Obviously, if you had a question raised in the financial area and it related to a tax matter, you should have access to that. My procedure—

Mr. WALDIE. Why should you? Did any other employee in the United States have access?

Mr. MOLLENHOFF. There is a very good reason.

Mr. WALDIE. Does the law permit any other employee to have access?

Mr. MOLLENHOFF. Tax officials have access.

Mr. WALDIE. Can the Civil Service Commission have access to Internal Revenue Service records for every Federal employee?

Mr. MOLLENHOFF. I am not sure about that. I don't know. Actually there is quite widespread access to tax returns.

Mr. WALDIE. There is?

Mr. MOLLENHOFF. It is on the statutes. All the State bodies have access to them.

Mr. WALDIE. I was under the naive illusion that tax returns are confidential.

Mr. MOLLENHOFF. There is a misapprehension on this, and a misapprehension that was widespread at the time I had access to tax returns. My only interest in the tax returns was in regard to appointees of the Administration.

Mr. WALDIE. Were you able to get tax returns of all appointees or prospective appointees?

Mr. MOLLENHOFF. I could have. To get it straight, I had access to nine tax returns, and I had to make a written application to the Commissioner, tell him why I wanted the tax returns, and then the returns would be sent over.

Mr. WALDIE. What would you say as to why you wanted it?

Mr. MOLLENHOFF. It would be a matter of whether it was an appointment or—well, it should be a prima facie case, a possible fraud. I can't go into what they were because of the Internal Revenue Code.

Mr. WALDIE. Wait a minute. What is the Internal Revenue Code?

Mr. MOLLENHOFF. Section 55 of the Internal Revenue Service Code makes it improper and illegal to discuss anything relative to what I learn from the tax returns.

Mr. WALDIE. Makes it illegal for whom?

Mr. MOLLENHOFF. Any Government official.

Mr. WALDIE. When they were disclosing it to you was that a violation of section 55?

Mr. MOLLENHOFF. No, no. Mr. Chairman, let's start over again. You may be too young to remember the Truman tax scandals of 1950-51-52, but at that time the top people of the Internal Revenue Service, including a Commissioner and a number two man, were indicted on fraud and income tax charges. I was very active in those investigations and I was very apprehensive of major income tax scandals coming to this administration.

Mr. WALDIE. That was part of your duties?

Mr. MOLLENHOFF. That was part of my duties as ombudsman to see if the IRS was properly fulfilling its duties. I was looking over its shoulder, and to look over its shoulder properly you had to have access to tax returns.

Mr. WALDIE. I get the point real well. You were the snooper of the administration.

Mr. MOLLENHOFF. No, no. I was supposed to keep the Government clean.

Mr. WALDIE. That is precisely the sort of argument the fellows in the Watergate used. They don't have to comply with the law.

Mr. MOLLENHOFF. I was complying with the law.

Mr. WALDIE. That is what I am trying to find out. Your authority for not disclosing to me the nature of the inquiries you made about tax returns, while you were employed by the President, is because you are prohibited by section 55 of the Internal Revenue Service Code.

Mr. MOLLENHOFF. That is correct. I could not disclose to anyone else within the White House except the President.

Mr. WALDIE. I see. I want to take a quick look at such a Revenue Code, Code 55. I personally don't see how you have authority to look at the tax returns. Does the President have the right to look at the tax returns of everybody in the country?

Mr. MOLLENHOFF. It would be absolutely absurd if the President couldn't supervise the Internal Revenue Service.

Mr. WALDIE. By "supervise," does that mean he has the right to look at the tax returns of everybody in the country?

Mr. MOLLENHOFF. He would have to look at the tax returns to see if the IRS was administering the law fairly. That was my whole intent. My intent was not to snoop.

Mr. WALDIE. What were you trying to find out?

Mr. MOLLENHOFF. If the Internal Revenue Service was administering the law properly.

Mr. WALDIE. Is it possible that the President may have had some people that he was dissatisfied with or fearful of and was seeking information about them? In your process of ombudsman, were you in any way in that sort of activity, where he would say "I don't know about this fellow, take a look and see what you can find out about him?"

Mr. MOLLENHOFF. There was no request in that area.

Mr. WALDIE. Had there been, would you have been restrained?

Mr. MOLLENHOFF. I would have dealt with the situation with restraint and with regard to what is proper and legal. I can explain one situation which gives you a pretty good idea.

There was one tax return that Senator Williams discussed on the Senate floor, so it is now in the public domain. There was one judge, a Federal judge from Milwaukee, who had filed no tax returns, Federal or State, for 8 years prior to the time he went on the Bench. There were indications that he was involved in questionable activity and had questionable income. It was at the request of Senator Williams that I made inquiries on that tax return.

Mr. WALDIE. Could Senator Williams have done that?

Mr. MOLLENHOFF. Senator Williams, from the Joint Committee of the Internal Revenue Taxation, could have made the same inquiry.

Mr. WALDIE. Would they have responded?

Mr. MOLLENHOFF. I am not sure. I think they would have been obligated to respond, but there would have been some general knowledge of it within the committee staff.

Mr. WALDIE. In other words, it would be much easier for you to make the inquiry and get the response than the Senator.

Mr. MOLLENHOFF. That is correct.

Mr. WALDIE. And so you inquired on behalf of Senator Williams, not the President, as to the condition of this Federal judge's tax returns.

Mr. MOLLENHOFF. In this instance I was delegated the authority.

Mr. WALDIE. By the President?

Mr. MOLLENHOFF. By the President to make inquiries on tax returns. I did not go to the President every time there was one, but the fact that I got only nine in 10 months demonstrates that I was restrained in the use of this.

Mr. WALDIE. Were the nine inquiries including the one from Senator Williams?

Mr. MOLLENHOFF. Yes.

Mr. WALDIE. Were the other eight directly from the President?

Mr. MOLLENHOFF. I can't recall. I can't remember how it was broken down. There were a number of them I initiated on my own.

Mr. WALDIE. A number of the inquiries?

Mr. MOLLENHOFF. Inquiries for tax returns.

Mr. WALDIE. Was there a successor to you when you left, to perform the same functions you were performing for the President?

Mr. MOLLENHOFF. I don't believe so or they wouldn't be in the mess they are in today.

Mr. WALDIE. Had there been a predecessor to you performing that function in any other administration?

Mr. MOLLENHOFF. Not in the overall concept. There was at one stage in the Kennedy administration, Carmine Bellino, who I think had the same authority from the White House staff. Most of the appointments and possible appointments were a matter of routine and would go to the Internal Revenue Service for a quick report back as to whether there was any current investigation underway involving a potential appointee.

Mr. WALDIE. One more question before Mr. Hillis begins. Were you performing this function at the time Daniel Shore was under consideration for appointment?

Mr. MOLLENHOFF. No, no.

Mr. WALDIE. Mr. Hillis.

Mr. HILLIS. You covered part of what I wanted to ask. Apparently this procedure was not just initiated with this administration, but has been used in the past.

Mr. MOLLENHOFF. It has been, and there have been widespread reports that it was abused. Being aware of the way it can be abused, I entered into this agreement with the Commissioner of Internal Revenue, and I had to make a written record so that anyone could go back at some subsequent stage and postaudit what I had done.

Mr. WALDIE. We can do this on this committee?

Mr. MOLLENHOFF. That is correct. I don't know what your authority is. There are committees that can do it. This is like all governmental power—all police power can be abused, and the restraint is the key to this. If you make a record so that you can be post-audited, that is one of the guarantees against it.

Where people are going around taking files out, sneaking them out, and looking at them surreptitiously, there is a strong likelihood that the administration will go completely astray. That is what is taking place in some of these burglaries.

Mr. HILLIS. My next question, Mr. Mollenhoff, of these nine returns that were sent over to you, how many of those people were Government employees? Were they all?

Mr. MOLLENHOFF. My recollection is that the bulk of them were Federal judges, and that there were no Senators, no Congressmen, and no elected officials. I realize the sensitivity of this area. If you ask for the tax return of a Congressman, or Senator, or Governor, you had to have a prima facie case that he was in things up to his neck.

Mr. WALDIE. You didn't require a subpoena, or anything, or a court process?

Mr. MOLLENHOFF. No, no. It was a matter of a form that had to be made out and sent over.

Mr. WALDIE. Saying that, "I am worried about this fellow, I am from the White House, and send over his returns?"

Mr. MOLLENHOFF. No; They would send it over sometimes with little or no explanation except that they had been in the papers. They might have been in the papers and it would be kind of obvious.

Mr. WALDIE. I am going to ask the Internal Revenue Service for the copies of the statement of the nine inquiries you have made. Those were the only inquiries you made? Those nine that were on file were the only inquiries you made to the Internal Revenue Service for tax returns?

Mr. MOLLENHOFF. That is correct. There were nine tax returns that I received.

There was a point where I just said, "Don't send me anymore because it is too much of a problem."

Mr. WALDIE. I don't understand that.

Mr. MOLLENHOFF. In March of 1970 there was a little furor about that fact. I was asked about it at a breakfast with reporters.

Mr. WALDIE. Asked about what?

Mr. MOLLENHOFF. Whether I had access to tax returns. I truthfully and forthrightly said I had access to tax returns. I was not asked about what circumstances, or how many I had had, or anything else.

There was a story that appeared and subsequently a great furor about me having access to tax returns. The furor died when Senator Williams went on the Senate floor and explained the circumstances, and I think you could do well to go back and read that record.

Mr. WALDIE. I will. I am asking were there more inquiries made to the Internal Revenue Service than the nine inquiries which are on file?

Mr. MOLLENHOFF. I don't know. It is my recollection there were a couple that I had not received that I do recall making a telephone call about, saying, "Don't send me any more. These are more trouble than they are good."

Mr. WALDIE. Were you getting them from sources other than a written request prior to this flap with the press?

Mr. MOLLENHOFF. No, no.

Mr. WALDIE. Was a telephone call ever used to get tax returns?

Mr. MOLLENHOFF. There might be a telephone call in connection with it. There would always be a written record.

Mr. WALDIE. So there would be nine on file to your recollection.

Mr. MOLLENHOFF. Yes; there would be nine on file.

Mr. HILLIS. I have no further questions on this one, Mr. Chairman.

Mr. WALDIE. Please continue, Mr. Mollenhoff.

Just this final question for the record. To your knowledge tax returns can be used for any other purpose than to check the tax situation of potential employees, other than the inquiry of Senator Williams, which obviously was not a potential employee?

Mr. MOLLENHOFF. In the judges' situation there were certain sitting judges, ruling on tax cases, and I raised the question about the propriety of people who were in tax difficulty sitting in judgment on other citizens. I think it was a proper question to raise.

Mr. WALDIE. Were there other than judges as to whom you requested information?

Mr. MOLLENHOFF. I can't recall. I can't even remember what their names are now.

Mr. WALDIE. Most of the nine were judges?

Mr. MOLLENHOFF. I think they were called city officials. I can't recall offhand.

Mr. WALDIE. In other words, if there was a major story involving corruption?

Mr. MOLLENHOFF. Whereas I thought there was reason for concern that there would be either favoritism for the official involved—in other words, the Federal judge—I was also concerned about the Internal Revenue Service being too soft in setting standards for a Federal judge. I wanted to be sure they were doing exactly what they would do in the case of any other citizen.

Mr. WALDIE. As the President's ombudsman with the authority to have access to tax returns, what other records did you have access to that other people would not, exercising the authority of the President?

Mr. MOLLENHOFF. Well, I would make inquiries on and obtain personnel files.

Mr. WALDIE. Were there any restrictions on your ability to obtain a man's personnel file?

Mr. MOLLENHOFF. I don't know that there were. I was very restrained in the use in that area. It was usually someone who came to me who wanted to look at his file and to go all the way into it. The Fitzgerald case was not one where I examined the file.

There was the case of a State Department Foreign Service officer who came to me, who had been checked out. He felt it was on an unfair basis, and he asked that I review the file to get the State Department people to do what was right. He has subsequently received a hearing as a result of my getting into the case and making sure that all his rights were protected.

Mr. HILLIS. Mr. Mollenhoff, in the various agencies and departments, as far as you know, are there persons who can get this kind of information from files in the personnel section?

Mr. MOLLENHOFF. I am not sure of that.

Mr. HILLIS. Get the IRS information?

Mr. MOLLENHOFF. I am not sure of that in detail. All I know is that usually people in personnel offices in other Government agencies are able to obtain rather wide information.

Mr. HILLIS. They can do this without the employee knowing, can they not?

Mr. MOLLENHOFF. That is correct, and the devastating thing is

that the employees are not permitted to examine their own files. I know a number of situations where this was specifically true. There had been a ruling by somebody or other that certain things—derogatory material—should be taken out of the file. But they will go back 6 months or a year or so later and find out that this material is still in the file or is in a separate file. When someone calls to find out about the man's work record, there will be the whispered reference that there is some other thing about him.

The things that are examined openly I am not concerned about. It is the sneaky business of people obtaining information in a surreptitious way and not making records and being able to say well, your file is clear of that.

Mr. HILLIS. How about IRS information? Can that be obtained?

Mr. MOLLENHOFF. I am not sure about that. I would doubt it.

Mr. WALDIE. In your capacity as ombudsman, were you able to have access to FBI files?

Mr. MOLLENHOFF. Yes, I had some access although I would more or less spot requests for information. Usually it would be information that would be available also through regular police or public records.

Mr. WALDIE. Did you keep records of those inquiries?

Mr. MOLLENHOFF. I did.

Mr. WALDIE. That is available for audit?

Mr. MOLLENHOFF. It would be.

Mr. WALDIE. Was the administration ever troubled about leaks of information during the time you were ombudsman, and if so, were you assigned to find out sources of leaks?

Mr. MOLLENHOFF. There was trouble with leaks but this would be something that I would not have been involved in.

Mr. WALDIE. You would not be involved?

Mr. MOLLENHOFF. I would have steered clear of that area. My whole position on open information policy was well known when I was over there, and I made it very clear within a matter of a few weeks that I was going to call on the inside in the same way, and that did not make me popular.

Mr. WALDIE. Why did you leave?

Mr. MOLLENHOFF. As I stated at the time, I had the opportunity to go back as Bureau Chief of the Washington Bureau of the Des Moines Register. I had been in this business for 25 years and I wanted to take a fling at government to see what it was like on that side.

Mr. WALDIE. You didn't like it?

Mr. MOLLENHOFF. I didn't like it. It was partly the obsessive secrecy of Haldeman and Ehrlichman. I was supposed to have direct access to the President when I needed it, and this got to be something that was stalled and stalled, and it was just unsatisfactory. I could also see these obsessive secrecy policies were going to get them into trouble.

Mr. WALDIE. Mr. Bafalis.

Mr. BAFALIS. I came in late and I didn't have the benefit of the testimony at this point. I will hold my questions at this point.

Mr. WALDIE. Let's get on with the other case.

Mr. MOLLENHOFF. The case of Otto Otepka stands as a case of massive injustice. It embodied all of the wrongs of the Watergate case,

including the wrongful and illegal use of eavesdropping and wire-tapping devices to try to get Otepka.

It embodied perjury in initially denying under oath that there had been any wiretaps on Otepka's State Department telephone. Three different individuals, high officials of the State Department, denied under oath officially that there were any wiretaps or eavesdropping devices used on Otepka's phone.

It included perjury upon perjury in later admissions that there were wiretaps, in denying that anything was overheard or that there were any recordings of those illegal wiretaps. Later it was established that there were wiretaps. There were recordings of about twelve conversations, and one of the coconspirators, Elmer Dewey Hill, finally admitted taking part in an illegal wiretapping of Otepka's telephone. He provided some information indicating that a dozen recordings had been made of conversations on the telephone. He was treated with the same disdain the White House now shows for former White House counsel, John Dean. He was forced to resign, but his coconspirators, John F. Reilly and David Belisle, were continued on the State Department payroll in a protected status.

I might say that the last time I checked, only a few months ago, John F. Reilly was a Hearing Examiner at the Federal Communications Commission. He had been forced to leave the State Department, but they took care of him at FCC.

In addition to all this perjury, subordination of perjury, and illegal wiretapping that was taking place, with apparent approval of the Secretary of State, Dean Rusk, and the White House, there were also some facets of the Otepka case that constituted an obstruction of justice, particularly in not following through with prosecution of Reilly, and Belisle, and Hill for the illegal wiretapping and the perjury.

But this is not the worst of the Otepka case. High officials of the State Department were not content to illegally wiretap Otepka, break into his security files to try to get something on him, and then to lie about it. His State Department superiors tried to retaliate against him for cooperating with a Senate subcommittee by bringing charges against him for violating an Executive Order in giving records to a committee to prove he was telling the truth and that his superiors were lying under oath.

In that instance Otepka had stated that a certain procedure was followed with regard to clearance of an official that was irrelevant. He stated that certain information was given to his superior. That superior denied that he had received that information. One was a memorandum he had written to the superior calling his attention to that specific information which was initialed by the superior. The other was a memorandum his superior had written to someone else passing on that information. The other was a security file involving a young lady, that was handled in a proper, regular manner. There was nothing derogatory in that file. This was given to a judiciary subcommittee in a closed session, so it was not used to embarrass the young lady. It was used as an ideal case, where there was nothing wrong to show how a case goes through normally, as contrasted to the irregular handling of the other case involving the questionable Government employee.

As a result of that cooperation with the committee of Congress, the State Department brought charges against Otepka for having made this improper disclosure in violation of some Executive order. So it was essentially the same as the *Fitzgerald* case. He gave the testimony in public session, but the cases are quite comparable.

His superiors also tried to frame him by planting clippings from classified documents in his burn bag and manufacturing other evidence to sustain a charge that they filed, but later dropped—that Otepka had mutilated classified documents.

Otepka's defense on all of these points was so well-documented that the State Department dropped the charges when Otepka was demanding documents that he claimed would prove the case against him was rigged. Even after the charges against him were dropped, Otepka pursued it with a special appeal to the Civil Service Commission for discovery dealing with the documents. The Civil Service Commission, in that one opportunity to stand on the side of disclosure to get the truth for Otepka, rejected his plea. That was what the State Department hierarchy wanted at that time. It was what the White House wanted. But it had nothing to do with getting the full facts on the line and getting the truth to the public or correcting the injustice.

It is my understanding that Mr. Mondello had one personal role in the rejection of the appeal by Otepka's lawyers for discovery in the records mutilation charge. I am sure that the subcommittee would be delighted to hear Mr. Mondello's explanation of this action in clear terms of what was wrong with the law, or the actions of the Commission or the rulings from his office.

I think that it would be most helpful if he would address himself to the specific case in clear understandable terms and not the confusing jibberish of Civil Service Commission jargon that usually obfuscates the true meaning of its actions.

I don't believe we need any statistics at this point. We should stay on the specific case in which the record rigging is charged, and in which the agency had dodged the opportunity to get to the bottom of the case and set a precedent that could have brought us the cleansing impact of a Watergate case several years ago.

Otepka's case is a case of a record rigging. The prima facie case is made where Otepka took the steps necessary to force the action and was rejected by the Civil Service Commission.

I think those cases will be sufficient.

I might say I have a note to call my attention to the fact that all Civil Service hearings prior to the *Fitzgerald* case apparently were closed. In most instances I can see probably it would be to the employee's benefit. He wouldn't want to make any great cause except that this was probably the first time that—

Mr. WALDIE. I think it was wrong. I think you served the employees and the Government well, and Mr. Fitzgerald did by seeking to force the hearings in the open when the employee requested them, but the fact it has never been done prior to the *Fitzgerald* case would indicate that the *Fitzgerald* case is not indicative of the point of wrong doing on the part of Mr. Mondello.

Mr. MOLLENIHOFF. I had this discussion with Mr. Mondello. I ex-

plained in the kind of terms that obviously you and the other members of the committee understand, why, where the employee is the one to be protected, if he waives that right, that there should be an open hearing.

Later there were some arguments made on budgetary grounds. If you start opening these hearings, Lord knows what we will find.

Mr. WALDIE. The *Fitzgerald* case was not unique, was it? The history of the Civil Service Commission, under any administration, had been to do that which they sought to do.

Mr. MOLLENHOFF. I am unaware there was a request for an open hearing in the past. There had been no open hearing requests. I can see where the Government employee comes in. There is a ruling that we don't have open hearings on Civil Service Commission matters. Rather than fight it, they thought he would just submit to it, thinking he would get a square deal and be surprised later, as most of them are, at the way the hearings are rigged.

Mr. WALDIE. Let me move on to some questions.

Mr. Hillis, do you have some questions?

Mr. HILLIS. Yes; I do, Mr. Chairman. Just a couple.

First of all, you brought some points into crystal clear focus here as to the rights of Government employees and how appeals should be handled. It appears to me from a very cursory examination and short search that you refer to the law and statute in the area of appeal. It also appears that those at the helm and at the departments owe their tenure to the so-called establishment, in other words the administration power. Am I correct?

Mr. MOLLENHOFF. Yes; there is this fraternity feeling among the personnel officers in Government that makes them all want to get along fine, and none of the adversary relationship that the Civil Service Commission should have with the various personnel officers. It should be in the position all the time to challenge the rightness of the agencies' decisions against the lowly employees, the single individual.

Mr. HILLIS. Are you saying, based on your 25 years experience, that that has not been the case?

Mr. MOLLENHOFF. That has not been the case. I was amazed in the late 1950's when one of the first cases, involving the secrecy of personnel officers, came before me in a very vivid way. In that case a woman, who had worked for the Civil Service Commission, had some kind of medical finding against her that—forced her out. She was unable to obtain that medical report by the Government doctor. Her lawyer was unable to obtain it and her doctor was unable to obtain it. Here they were saying, "We have a secret report that says you are unqualified but we won't tell you what it is." It puts the employee in an absolutely impossible position because it is a faceless accusation and a general charge of mental instability. That is what it amounted to in that case. She had doctors on the outside who said she was perfectly qualified. This was a stenographer's job, or a secretary's job, yet she was being ousted.

Mr. HILLIS. In your opinion, could some of those problems be corrected with, perhaps, somebody in the department serving as ombudsman administering for the employee?

Mr. MOLLENHOFF. I did a column on this a week ago. I would think that a statutory ombudsman would be the answer in many of these agencies, and also as far as the Government generally is concerned. The White House could not exert pressure on him. His status would be comparable to the Comptroller General. You can get a large number of people who will be independent enough and have integrity if they are out there by themselves, and there is no question about their tenure. When you are under the White House operation, it is difficult to withstand the pressure, as we are seeing.

Mr. HILLIS. Regardless of personalities involved here, the Chairman of the Commission is appointed by the White House, is he not?

Mr. MOLLENHOFF. That is correct. If you have an ombudsman for the Civil Service Commission—

Mr. HILLIS. The man in Mr. Mondello's position, he is appointed by the Chairman of the Civil Service Commission, is he not?

Mr. MOLLENHOFF. He is serving under the Chairman of the Civil Service Commission. I don't know how many of these things Mr. Mondello believes personally, or whether he is like many lawyers who say: "I am just an advocate for the man who is paying my salary, and I don't necessarily believe or disbelieve." What I am saying is that I am trying to do the best job that I can within that context. I have a great deal of sympathy for people in those positions who do that type of thing because they are also a part of what makes things work. However, they should try to be a force for fair play and justice whenever they can be. Too many of them settle into a comfortable niche of just getting along with the boss and the miscellaneous agencies that they have to deal with, and saying "To hell with the average employee."

Mr. HILLIS. One other question to get your opinion. If an employee finds himself in the position of Kenneth Cook or Otepka, and decides to take on the Commission and the Government, he has to do so at his own cost? What does it cost to defend him in these things?

Mr. MOLLENHOFF. I don't know what it costs, but I know Ernie Fitzgerald would not have been able to afford his defense if he had not been represented by the American Civil Liberties Union, and he had in this case some excellent lawyers really dedicated to, not only the principle, but to the facts in the *Fitzgerald* case; not only the client, but the principle they were trying to get across.

If you had the ombudsman, who would have the authority to examine all the records? That is why I say the ombudsman must have the right to examine all the records. He must also have a right, as well as a responsibility, to make public reports every 3 months, 6 months, or every year to the Senate, the House, and to the President, and on his own to publish them, so they can't be bottled up. He should have no authority in and of himself to take action, but such action should be based upon the rightness of the facts in his case and the simple logic and truth that he brings to the case.

Mr. WALDIE. Did I understand correctly that your title in the White House was Presidential Ombudsman?

Mr. MOLLENHOFF. Special Counsel to the President.

Mr. WALDIE. The ombudsman would function--people would come to him who would have no other recourse?

Mr. MOLLENHOFF. I had that function too. People came to me about Fitzgerald, they came to me about John Hemenway, and about others. They could not get justice in the departments. There were a number of contractors that wrote to me relating to a problem of some contracting officer who was just standing in the way of a settlement and wouldn't take a decision for or against. In most of those cases all I had to do was to write a letter that this has been called to my attention.

Mr. WALDIE. You did investigative work as well as responding to people who could not break through—

Mr. MOLLENHOFF. Ninety-five percent of the material I would deal with would be material I could have had or should have had as a newspaper reporter from the outside.

Mr. WALDIE. One final question. The confidential records, to which you had access by reason of your position, and whose custody you were responsible for, were they made available to others?

Mr. MOLLENHOFF. They were not made available to others. Those tax returns went into a safe in my office. It was opened when I came in in the mornings and the secretary would bring them to my desk, and I would review them. I might say that in those particular cases there was no action that I stimulated other than a simple note to the Internal Revenue Service just to make sure that this is being handled in a fair manner. I could justify my actions if questions were raised about it.

Mr. WALDIE. All right Mr. Mollenhoff. As usual your testimony is provocative, and informative, and challenging. If you will retire now, we will ask Mr. Mondello to come forward. Please hold yourself in readiness in case we have further questions.

Mr. WALDIE. Mr. Mondello, do you have a written statement?

Mr. MONDELLO. No, sir, I worked until late last night on what statement I can make. As a matter of fact, I will be reading from what I am afraid are very rough notes.

Mr. WALDIE. Well, please proceed.

STATEMENT OF ANTHONY L. MONDELLO, GENERAL COUNSEL, CIVIL SERVICE COMMISSION

Mr. MONDELLO. I will proceed as quickly as I can. I think in my statement I have anticipated the responses to questions you have been wanting to ask me and if that is not adequate you can ask further questions.

Mr. WALDIE. Please proceed.

Mr. MONDELLO. I appreciate the opportunity provided by the chairman to attempt to rebut the recent testimony before this subcommittee by Mr. Clark Mollenhoff, in which he made certain critical and unsubstantiated statements about the Civil Service Commission, about me, and about some of my colleagues at the Commission.

Neither Mr. Mollenhoff nor I, as individuals, are important enough to take up the time of this committee. However, Mr. Mollenhoff's out-of-hand indictment and irresponsible charges against the Civil Service Commission do merit your further attention because they damage an institution that serves the public interest well and needs

the public's confidence. The fact that they are empty charges is what is most distressing.

Mr. Mollenhoff criticized me and Mr. Drummond for dealing in generalities—and then he proceeded to blacken the commission by the broadest generalities drawn from scant specifics, for his whole argument is founded on his view of a mere handful of cases.

He accuses the Commission's hearing officer in the *Fitzgerald* case of being biased—then, in the next sentence shows this judgment to be based on his own bias against the man he brands as biased.

He seeks to qualify himself as an expert observer with references to his twenty years of trying to get justice out of the Civil Service Commission. Yet his statement shows he lacks the most elementary understanding of the Commission, the Federal personnel system, or the processes which provide protection to employees against arbitrary and capricious actions by superiors.

His conclusions and charges are based on eight cases he mentions, most of which were foreign service cases not within the jurisdiction of the commission. In fact, only three that he cites fall within the commission's purview—and one of these, the *Hemingway* case, came under commission consideration only recently.

So, in effect, Mr. Mollenhoff's indictment of the commission is based on his acquaintance with two cases in his work on civil service cases over a period of the last 20 years. I submit that, even if he were justified in his judgment of commission consideration of the two cases—and I shall try to show that he is not—only two cases out of thousands in 20 years would be a pretty creditable record by any fair assessment.

Perhaps the quickest and best way to inform you of how different the real world looks to Mr. Mollenhoff and to us is to discuss the *Cook* case. He writes and says things about it that neither he nor anyone else has any reason to believe. I find this distressing because he had all of the facts available to him that I ever had available to me, but he chooses to manufacture the monstrosity—what he calls the horror case—that he likes to write about; and I think what he writes about is the sheerest poppycock.

On page 143 of the transcript he talks of the commission's arbitrary, arrogant disregard for the rights of employees, mentions rigged medical reports, rigged psychiatric reports, the ignoring of clear evidence that the medical decisions are not valid, the *Kenneth Cook* case being the most recent example. By page 146 he has the commission condoning the rigging of personnel files through the agencies for the purpose of fabricating a false image about them which is then projected before the public. By page 147 of the transcript we learn that Federal personnel managers have developed an expertise in preparing false administrative indictments against employees who are then subjected to—one of his favorite expressions—star-chamber proceedings with no opportunity to cross-examine their supervisors or obtain relevant documents. These managers also introduce malicious and false testimony into the records.

To me, this is outlandish and scandalous puffery on his part which he has nowhere sustained, and it does not describe the *Cook* case. I suggest that if Mr. Mollenhoff has any such facts, he report them to

you or to us so that such matters could be corrected. If he makes no such report, I will continue to assume he has no such facts.

His account of the *Cook* case makes it appear that the commission's decision to approve Mr. Cook's retirement on disability was based almost exclusively on an examination of Mr. Cook by an Air Force base physician who was probably prejudiced against Cook—remember, he was alleged to be the friend of the commanding officer that was trying to get rid of Cook—and may have been unqualified to render any report on him, again, according to super-doctor Mollenhoff—and that that report conflicted with the opinion of an Air Force doctor at a higher level and other outside experts. Obviously, he then suggests, the commission chose the one report that enabled it to support the Air Force in its effort to get rid of Mr. Cook; that that's all we try to do at the Commission, of course, is support the agency in every discharge case, or in this particular situation, a disability case—to support the Air Force at all costs in its effort to get rid of Mr. Cook.

The fact is that Mr. Cook was examined not only by a five-member Air Force medical board, but also by: (1) a consulting psychologist from the University of Texas; (2) by a neuropsychiatrist of Mr. Cook's own choosing, who also referred him to; (3) a clinical psychologist; (4) by personnel of a psychological center, through arrangements made by the Commission's Denver regional office; and (5) by medical personnel of the commission's regional office. He was subsequently seen by the commission's medical director in Washington.

In addition, the commission's medical director offered—and Mr. Cook rejected—a further extensive examination.

Mr. WALDIE. Let me interrupt there a moment. What was the result of all those?

Mr. MONDELLO. I will get to that in a moment.

Mr. WALDIE. Fine.

Mr. MONDELLO. But he was offered and he rejected by the medical director of the commission a further extensive examination, including hospitalization at the U.S. Public Health Service Hospital in Baltimore. Mr. Cook elected instead to have his case referred to the commission's Board of Appeals and Review, and this was done.

Following the board's review and decision to sustain the disability retirement action of the Bureau of Retirement, Insurance, and Occupational Health, Mr. Cook requested and received reconsideration of his case by the Civil Service Commissioners. The Commissioners made a thorough personal review and sustained the BAR decision. I should say, as a result of the comment made this morning about our unwillingness to investigate anything on behalf of Mr. Cook, that relatively immediately prior to the Commissioners' own review of the case, Mr. Cook had spoken to one of the Commissioners, Mr. Andolsek, and had asked him to take statements from five or six people throughout the United States who he thought would say what was beneficial to his cause, and these people were spotted all over the country. Mr. Cook had been in Chicago and Denver and around, and we found where those people were and we went and asked them for statements along the lines that Mr. Cook asked us to do, and those statements are in the Cook file.

But this morning I understood from Mr. Mollenhoff that we refused to investigate on Cook's behalf. Mind you, Mr. Mollenhoff had those records so that he should have been able to discover from reading the file whether we did or did not investigate, and he simply misdescribes what he saw.

All but two of the doctors who examined Mr. Cook agreed that he was medically unfit for duty.

Mr. Mollenhoff's account also makes it appear that the Air Force decision to seek Mr. Cook's retirement was based solely on problems resulting from his complaint that his commanding officer was distorting scientific reports. The record shows that the Air Force faced a number of work-site problems because of Mr. Cook's aberrant behavior on the job, the details of which I don't think any of us should be getting into here.

Now, one can be almost certain that Mr. Mollenhoff knew all of this when he wrote about the case. I know he had all the facts before him because I sent him the entire file. While he was serving in the White House, he demanded, obtained, and—judging from the state of the file when we got it back—he or someone for him had thoroughly reviewed the Commission's official file on the case. But he apparently chose to report only what suited his purpose as Cook's champion. Frankly, I don't like the idea then or now, upon reflection, that Mr. Mollenhoff, who had taken up the cause of Mr. Cook, should from the White House act as a kind roving ombudsman, which I don't think he was. I gather from what he said this morning he had a law enforcement function at the White House, which is very strange. I would like to think that he could not get his hands on my Internal Revenue report because I happen to think those are confidential between me and the Government and there are restrictive circumstances in IRS on who can have them. There is nothing in my report that I am afraid of. I just do not like the idea of people going behind the scenes and looking at that kind of thing.

Mr. WALDIE. Let me interrupt. Do you have the same feeling about having access to personnel files of Federal employees?

Mr. MONDELLO. Do I have the same feeling? I think these personnel files, just the official personnel record of employees, ought to be available to the personnel types who have to worry about when somebody comes on duty, when he got promoted, what his pay is, when he retires—all of that kind of information.

Mr. WALDIE. Should they be available to a special counsel to the President simply upon request?

Mr. MONDELLO. Ordinarily not. I don't think they should be available ordinarily.

Mr. WALDIE. They were ordinarily made available in this instance.

Mr. MONDELLO. They were made available in this instance because I thought that the White House was reflecting some oversight responsibility with respect to us.

Mr. WALDIE. Is there any law relative to any restraint on provision of personnel files to the White House representatives?

Mr. MONDELLO. No; there is a more general law than that about how you handle such files, and I think it was perfectly proper for me to have given the file to Mr. Mollenhoff when I did. The *Cook*

case had been thoroughly decided. As a matter of fact, I suppose at that time it was still in litigation and——

Mr. WALDIE. If a representative of the White House calls your agency and says, "I want to see the file on any Federal employee," are there any restraints on your ability to withhold that file or turn it over to them?

Mr. MONDELLO. The matter of who can see an official personnel file is covered in our regulations and I am really in a bad way—since I don't have them before me—to tell you who can and can't see them. But they are available to Members of Congress and to others who need them for official purposes, as described in the regulations.

Mr. WALDIE. Well, will you provide me with the constraints, if any, on their availability to the White House?

Mr. MONDELLO. Absolutely. I will inform you about the constraints generally, including availability to the White House.

Mr. WALDIE. I presume in this instance you found no reason to withhold the file. The entire file was turned over to Mr. Mollenhoff.

Mr. MONDELLO. That is correct, sir.

Mr. WALDIE. And though you express reservations as to whether the IRS should turn over your files to Mr. Mollenhoff——

Mr. MONDELLO. That is correct.

Mr. WALDIE. I suppose Mr. Cook ought to have the same reservations expressed by you in handling his file.

Mr. MONDELLO. I am aware of the problem.

Mr. WALDIE. What is the solution?

Mr. MONDELLO. Well, I guess I was concerned in this very case about what might happen with the file and where it would go. I pointed out what the requirements of our regulations were at the time in the letter I sent to Mr. Mollenhoff when I sent him the file and asked him to observe the confidentiality of it, pointing out in particular the single most important issue in the Cook case, which was whether Mr. Cook should see his own medical reports or not. I will be dealing with that in a moment. I was hopeful that Mr. Mollenhoff would review the file, make his own judgment as to where the merits lay, permit it to be litigated, and leave it alone.

Mr. WALDIE. I can't see that you are adhering to the confidentiality if you turn the file over to anybody other than Mr. Cook, and I presume you would not have turned it over to Mr. Cook had he asked it, would you?

Mr. MONDELLO. We had the opportunity to turn it over to Mr. Whitten.

Mr. WALDIE. Would you have turned it over to Mr. Cook had he requested it?

Mr. MONDELLO. We turned over to Mr. Cook, or his lawyer, many sections of the file, but not the medical reports.

Mr. WALDIE. You turned over the file to the extent that you turned it over to Mr. Mollenhoff?

Mr. MONDELLO. No, sir.

Mr. WALDIE. Mr. Mollenhoff is entitled to learn more?

Mr. MONDELLO. Mr. Mollenhoff sat in a different position with respect to the Commission than Mr. Cook did.

Mr. WALDIE. What different position was that?

Mr. MONDELLO. I think what that position consisted of is that the Commission operates a good many of its responsibilities under Executive orders issued by the President which are issued to be supportive of the responsibilities placed on the President by the Civil Service Act.

Mr. WALDIE. So this somewhat substantiates one of Mr. Mollenhoff's basic contentions that the Commission acts on behalf of the executive branch.

Mr. MONDELLO. We are the President's personnel managers; yes, sir. It is a clear responsibility we have.

Mr. WALDIE. All right; who represents the employee?

Mr. MONDELLO. Mr. Cook was represented by a very good attorney.

Mr. WALDIE. Under the system, if you represent the executive branch because you are appointees of the President, who represents the employee?

Mr. MONDELLO. It depends on the situation as to who we are in the position of representing.

Mr. WALDIE. You are always in the position of representing the President, aren't you, or the executive branch?

Mr. MONDELLO. Well, it depends on what the function is. With respect to adverse action appeal cases, for example, we don't represent anybody but we are the adjudicators.

Mr. WALDIE. Why did you turn Mr. Cook's file over to Mr. Mollenhoff?

Mr. MONDELLO. Because the case was over. It was then being litigated.

Mr. WALDIE. Does that matter? Does that mean confidentiality can be ignored once it's over?

Mr. MONDELLO. Yes, to some extent.

Mr. WALDIE. Could Mr. Cook have access to that file?

Mr. MONDELLO. No; not the medical records. He had access to the rest of it.

Mr. WALDIE. But Mr. Mollenhoff could have access to the medical records?

Mr. MONDELLO. Yes; I think I had a special interest in seeing that Mr. Mollenhoff saw those records.

Mr. WALDIE. You may have had a special interest, but what does the law say?

Mr. MONDELLO. I think the law is silent on this. Again, I told you that when I wrote to Mr. Mollenhoff and sent him the file I reminded him of the provisions of our regulations——

Mr. WALDIE. That is hardly adherence—if they are confidential, it's hardly adherence to confidentiality to disclose and tell the person you disclose to to keep this confidential.

Mr. MONDELLO. It depends on what those regulations say, Mr. Chairman, and I would like to refresh myself on that.

Mr. HILLIS. Mr. Chairman, I think you made a very good point there as to whom the Commission represents. It was very difficult it seems to me, sir, for the Commission to carry water on both shoulders. The question I get to here is how does the employee who has charges pending against him get some representation in the hearing, or how is that employee's interest really going to be safeguarded if you are the representative of the executive branch?

Mr. MONDELLO. It depends on which hat we are wearing at the time a particular matter comes to us with its facts.

Mr. HILLIS. Can you wear more than one hat?

Mr. MONDELLO. Yes, sir, I think that can be capably done. In fact—well, I will get to that in a moment. I do plan, by the way, to go through some of these procedures which show how we do wear both hats.

Mr. Mollenhoff's final misleading omission is classic. He spends a good deal of effort, when he writes or talks of me in connection with the *Fitzgerald* case, on the fact that I was so bold as to push the litigation of the issue there since the Commission lost on the merits. On *Cook*, he told the public nothing of litigation. In a statement before you, he merely mentions the fact that there was litigation.

What he doesn't report is that the court upheld the Commission's position and dismissed the case. The decision turned on the issue Mr. Mollenhoff still debates—whether Mr. Cook should have had access to the medical reports.

Although the Commission does not make medical reports in mental or terminal medical situations available to the employee, it does make them available to a licensed physician the employee may designate. The employee's physician is free to make available to his patient whatever he, in his professional judgment, believes to be in his patient's best interest. In Mr. Cook's case, his medical records were made available to two different doctors he designated at different times. In the light of Mr. Cook's suit, in which he and his attorneys were still seeking some of those documents, my assumption is that his physicians felt it not prudent to make all of the information available to him; and I think the soundness of the Commission's policy is supported by the court's decision.

Some rather long years ago, when I worked in the Department of Justice, I knew of cases where people tried to fix liability on the Government because its employees had inadvertently or negligently permitted patients to learn of their true condition, and the patients had injured or destroyed themselves or others. Mr. Mollenhoff may be willing to assume that responsibility. We think it is better left to the judgment of the patient's doctor.

That is Mr. Mollenhoff's case of the "rigged records." He had possession of all the records and he had the opportunity to verify their accuracy as authentic documents.

Mr. WALDIE. I am still lost here. If it is correct that medical records should only be released to a physician because of a fear the patient may destroy himself or be harmed or damaged by knowing these things, how then is it released to Mr. Mollenhoff?

Mr. MONDELLO. I think because at the time we did release them we felt that he, as you right now, had oversight responsibility over some of the functioning of the Civil Service Commission.

Mr. WALDIE. I read the regulations of medical records and I don't see any such authorization. Is it your view that anyone you believe has oversight over the function of the Civil Service Commission has access to all the information in the possession of the Civil Service Commission?

Mr. MONDELLO. It depends on what stage the case is, but I think

certainly now that the Kenneth Cook case is closed, Mr. Chairman, if you ask for that file—

Mr. WALDIE. We would get it?

Mr. MONDELLO. I would hope to go back and persuade whoever makes that decision to give it to you.

Mr. WALDIE. Why would you have to persuade them if we are entitled to it under your authority? There is no persuasion required, is there? Are we entitled only upon someone in the agency deciding we can peruse the information?

Mr. MONDELLO. We have furnished to congressional committees copies of documents that we regard as confidential.

After having initially worked out with the committee that this would be obtained in confidence; we have never pushed one of those matters so far as to even raise the question about executive privilege and I doubt that they deserve that kind of treatment, but that is where the issue would go next if we decided that the document was so damaging to whatever the work function was that you just couldn't have exposure and the function at the same time.

Mr. WALDIE. You see, what the committee is worried about is the general view of confidentiality. All of a sudden I am seeing a major new code in what I assume was confidentiality. First, to the White House staff, apparently confidentiality on anything means nothing. But if the White House staff person calls any agency in the executive branch of government and says, "I'm calling from the White House under the authority of the President and I want this information," everybody snaps to and provides it, regardless of what the law says. Is that an overstatement?

Mr. MONDELLO. I think so.

Mr. WALDIE. Well, is it an overstatement with regard to—

Mr. MONDELLO. I don't have any firm recollection of just what I went through when I got Mr. Mollenhoff's letter.

Mr. WALDIE. With regard to your agency, is it an overstatement?

Mr. MONDELLO. Yes, sir, I think it is an overstatement.

Mr. WALDIE. So there are times when you would refuse a request from the White House for personnel file information? Is that a correct statement and, if so, why?

Mr. MONDELLO. Again, I would do whatever the regulations seem to permit me discretion to do. If I had discretion to refuse and the situation were one where I should refuse, I would refuse.

Mr. WALDIE. For example, if Mr. Mollenhoff had called for that file during the pendency of that case, would you have delivered it to him?

Mr. MONDELLO. Before the Commission decided?

Mr. WALDIE. Yes.

Mr. MONDELLO. No, sir.

Mr. WALDIE. So the regulations you feel make a distinction between a case that is in process and a case that is concluded?

Mr. MONDELLO. A case that is pending for decision before the Commission and a case—yes—that has been decided.

Mr. WALDIE. And you would not provide any information to the White House in any case that was pending?

Mr. MONDELLO. I know of no such case in which we have.

Mr. WALDIE. Well, the Fitzgerald case is an example. I presume you received requests from the White House relative to Mr. Fitzgerald's case.

Mr. MONDELLO. I have received none.

Mr. WALDIE. You have received none. Has the Commission?

Mr. MONDELLO. Not that I know of.

Mr. WALDIE. OK. If it did, it would be refused?

Mr. MONDELLO. Yes; I think so. I think while the case is pending, in that one of our hats that we wear requires an impartial adjudication, nobody in the Commission can talk about the merits of such a case. The question is whether you can talk about the procedures.

Mr. WALDIE. I doubt whether anyone on this committee would argue that. I agree with that. I doubt very seriously that that would in fact be the response if the White House calls and says that the President wants to see Mr. Fitzgerald's case. I doubt you would tell the President that it is pending and we can't give it to him.

Mr. MONDELLO. I don't think that is what you would tell the President.

Mr. WALDIE. No; that isn't what I would tell the President either. What would you tell the President?

Mr. MONDELLO. Well, the President is granted by Congress very specific statutory authority about the 2.6 million employees who work for him.

Mr. WALDIE. All right. So if Mr. Mollenhoff calls on behalf of the President while the Fitzgerald case was pending or the Cook case, and says, "I am speaking for the White House and I want to see that file," you will turn it over to him?

Mr. MONDELLO. Speaking for the White House is not enough. He would have to speak for the President and if I doubted he was speaking for the President I would have had the means to discover whether he was.

Mr. WALDIE. Suppose I am special counsel for the President and I am calling on behalf of that authority and want to see the Cook file. Would you have provided it to me?

Mr. MONDELLO. Pending the decision, I don't think so.

Mr. WALDIE. What would you have asked? More authority on behalf of the President?

Mr. MONDELLO. You don't need more authority to decline.

Mr. WALDIE. If you were convinced that he was speaking for the President, you would give it to him; wouldn't you?

Mr. MONDELLO. If the request came to me and it came as a request from the President, I would then march into the chairman of my Commission and let him know what was going on. He talks to the President sometimes. I never do.

Mr. WALDIE. Then it would be given to the President, wouldn't it?

Mr. MONDELLO. Well, I am not sure.

Mr. WALDIE. OK. Mr. Bafalis?

Mr. BAFALIS. Mr. Chairman, the only thing I would like to point out is that the President is the Chief Executive of this Nation and unless there are regulations prohibiting such files on employees going to the President, I don't quite frankly see why he should not have them.

Mr. WALDIE. Well, perhaps he should not. That is what I am really trying to find out. Does he? Then we can decide whether he does or not.

Mr. MONDELLO. I know of no presidential request for any employee's file. If somebody came to me and told me there was intervention at this high level with respect to a case that was about to be decided or pending the course of decision, it would be my duty as counsel to my chairman to say to him,

Be careful what you do because you can louse up that case so that when it gets to court, no matter what the result, it won't stand up. And if you are willing to take that risk, you can show the file to the President.

Mr. BAFALIS. Mr. Mondello, let me speak from corporate experience, which is entirely different than government experience, but I could not imagine being a chief executive of a corporation and have my general counsel deny me files on my employees and, in essence, these people are employed by the President. He is the chief executive officer.

Mr. MONDELLO. True. He is the manager of the Federal work force.

Mr. BAFALIS. Unless you are prohibited by regulation or law, I don't see how you could deny those files to the President.

Mr. MONDELLO. Mr. Congressman, the question becomes—at that final point when you say to the President when he says, "Give me the file," if you just willy-nilly hand it over, I don't think you have done your duty to him as the manager of the Federal work force. I think you owe it to the system that we run to tell the President at that point, "If you accept this file and look at it and raise even the suggestion that you decided the case and the Commission did not, that is the end of the case;" and he had better know that from somebody or he can't do his job effectively.

Mr. BAFALIS. But that is advice that you are giving the President. That does not mean you deny him those files.

Mr. MONDELLO. No; I think the President probably has the capability to issue an order over that kind of objection, but I think you owe that measure of responsibility to the competitive system and you have got to do that.

Shall I continue?

Mr. WALDIE. Yes; although I think Mr. Bafalis is pursuing an awfully important point, the answer to which I am not quite certain that you gave. Was your answer that under circumstances where you felt the President was improper in requesting information that it would be withheld from him until he specifically ordered it be given him, despite your reluctance?

Mr. MONDELLO. Well, I was not discussing the question of where it would be improper for the President to look.

Mr. WALDIE. Is there an area where it would be improper for the President to have information in a personnel file?

Mr. MONDELLO. No; I have not regarded this as a matter of impropriety. The question came up in terms of if the President wanted a particular file should you give it to him, and I was suggesting that your response has to be much more finely tailored than that. You don't simply give it or not give it. If you don't give it, I suppose if the President did not like your performance he could dismiss you

or shunt you aside. But the fact remains that you are responsible under the statute to run the system. Surely, the President is the chief executive. I assume he can give orders to the Civil Service Commission and I know that he does. The first nine rules of the Civil Service are edicts by the President to the Commission to run their business in such and such a way, and I regard all of that as perfectly proper. But when the time comes that he wants a file that deals with a case that is *sub-judice*, so to speak, then I think the function of me or the chairman of the Commission or anybody is to tell him what he is affecting. If he nonetheless wishes to see the file, I think you may have to give it to him; but he then knows that he takes the risk of having the case fouled up.

Mr. WALDIE. I think that was Mr. Bafalis' point. When you get down to the final decision, if the President says, "I want that file," he gets it.

Mr. BAFALIS. Mr. Chairman, I might add, unless there is a law to the contrary, I think he should be allowed to see it.

Mr. MONDELLO. There may be laws that prevent it. For example, I know that the FBI, in past times when I was in the Department of Justice, used to seek information on cases that they had been going after for law enforcement purposes from either the Census Bureau or from a part of the social security system where the files are confidential by statute; and it was the normal course of the work over there at HEW to simply decline to furnish information. That was the end of it. Everybody understood the rules of the game. Congress had stated them quite explicitly and that was that.

As a matter of fact, Mr. Mollenhoff was talking about how in his job in the White House he had to go get IRS reports. That looked to me like a law enforcement purpose and I don't know why anybody gave it to him to do. We run what I think is a very effective therapeutic system about conflicts of interest—the Civil Service Commission does. With respect to Presidential appointees, particularly those who are responsible directly to the President, we at the Commission review the financial statements of those people in order to see if there are any incipient conflicts. We don't play a cops and robbers game with this. I don't seek their Internal Revenue reports and I am not supposed to. We look at what they report to us and if we see anything in there that is troublesome from a conflict of interest standpoint—and that is a simple comparison of his financial interests and the duties he is about to perform—we tell him about it. We are not trying to put him in jail or do anything else like that.

We want to be sure as he takes his job—and we do this within 30 days of every one of those appointees getting onboard—we want him to know this is serious business and he has got to avoid conflicts and that we see the potential for trouble. We counsel with him.

Mr. WALDIE. Do you have the right to look into the IRS records?

Mr. MONDELLO. No, sir, I don't think we do. Again, I have to rely on my experience with the Department of Justice. I used to work in the fraud division. These were frauds against the U.S. Treasury and sometimes it became important for us to look at net worth statements and see where the money came from because we thought it came from Government funds. There were some cases where these cases

were being handled by me for civil fraud, and had been handled by the criminal division for criminal fraud. You could not get an IRS tax return without getting the signature of an assistant attorney general, either in the civil or criminal division of the Department of Justice. He had to sign a letter not only requesting the IRS report but stating why he needed it. The ultimate decision as to whether it would be given to you was the IRS' decision, which it came to under its regulations which I understand are issued pursuant to statute. What its practice is you can determine from them. This is 10-year-old information.

Mr. WALDIE. I think so I can get a clearer picture on the line Mr. Bafalis was talking about, would you please provide the committee with a written statement as to the areas within which you have the judgment of failing to respond to requests from the President or a Presidential representative in the White House, such as Mr. Mollenhoff was, such as Mr. Ehrlichman or Mr. Haldeman were? Can they request of you any information on any Federal employee and must you provide it, or are there areas within which you may refuse?

That seems to me to be important for the committee to know. I do not personally concur with Mr. Bafalis' view that all information in those files ought to be available to the President, particularly not—and I don't think Mr. Bafalis included this—I do not believe the President should have the right to look into income tax returns of all Federal employees.

Mr. BAFALIS. Mr. Chairman, that is not a part of the personnel records.

Mr. WALDIE. I agree. But my concern is that I don't know how far the executive is claiming its rights to inquire into all sorts of matters involving its employees, and that is the purpose of the legislation before this subcommittee. So part of that intrusion in the privacy or possible intrusion in privacy would be the ability of White House people to intrude in the privacy of Federal employees, and I think the committee would be well served were you to give us a written memo as to your understanding of the regulations vis-a-vis a request from Mr. Mollenhoff or Mr. Ehrlichman or Mr. Haldeman speaking on behalf of the President. Obviously, the President is not going to call you, but someone from the White House staff. Must you turn it over or do you have areas within which you can refuse, like cases pending.

Mr. MONDELLO. Depending on the level. I will try to write around what you want.

Mr. WALDIE. Don't write around it. Write on it.

Mr. MONDELLO. It's a broad area and it is going to be a long memo.

Mr. WALDIE. One of our problems is everybody goes around these issues. I would like to get on these issues so we understand them. If you do not understand it, say so in your memo; just say, "We don't know where the hell our authority is," and then we will—you may have a position and say, "I don't know what the position is here because it is not spelled out by regulation or statute." Maybe the committee can assist in that. Maybe the committee will say this ambiguity is essential to the situation. I don't know. But I think the committee ought to know where you are confused, and I gather there is some confusion.

Mr. MONDELLO. I regard that as a totally legitimate exercise.

Mr. WALDIE. I am not being critical. Just tell us what you know and where you don't know the answer because it is unclear let us know that too.

Mr. MONDELLO. Okay. Mr. Chairman, I don't think the Commission will ever mind you being critical. I am here this morning only because somebody else has been critical but who really mishandles the facts.

Mr. WALDIE. I understand it. If the Commission did mind it wouldn't stop me.

Mr. MONDELLO. I understand that, too.

Mr. WALDIE. And you are not here under the spotlight of—we are here to try and get a better feeling about some of the issues that Mr. Mollenhoff raised and I think you are shedding some light on them. I appreciate it.

Did you answer in that *Cook* case, by the way, what were the results of these various medical examinations?

Mr. MONDELLO. I don't have a precise count of the number of different doctors or psychologists who examined him. I think it is something like 14, because there were five in one group and I don't know the composition of the other group or the number of specialists along the way, but out of them all, there were two reports that would have accepted Mr. Cook's continued retention at his job in the service.

Mr. WALDIE. I got the impression from Mr. Mollenhoff that their only authority that said he ought to be discharged was the base doctor.

Mr. MONDELLO. That is completely wrong.

Mr. WALDIE. Did the chief psychiatrist of the Air Force say he had nothing wrong with him?

Mr. MONDELLO. There was a Lieutenant Colonel Grissom who I think he refers to. I don't know what his real function was. I think he was a psychiatrist. I am not sure whether he met with Cook or interviewed him—who declared—I have a quotation of that report but apparently I don't have it with me.

Mr. MOLLENHOFF. I think that is the basic point. The top Air Force psychiatrist said Cook did not have a mental disability.

Mr. WALDIE. We will try to get to the basics. You are going to have an opportunity in a minute.

Mr. MOLLENHOFF. Okay. Fine. Because there are a lot of things that are being thrown in here that I want to get back into.

Mr. WALDIE. Mr. Mollenhoff, you were not interrupted and I assume you would not—

Mr. MOLLENHOFF. I did not mind being interrupted. I would have loved having some discussion about this.

Mr. WALDIE. But I mind your being interrupted and I mind the witness being interrupted.

Mr. MONDELLO. Mr. Mollenhoff characterizes the Commission and its officials as not concerned with doing what is fair and just and faults the Commission for not serving as a protective shield for Federal employees. I think that serving as a protective shield for employees is only one of a number of major statutory functions of

the Commission in its assistance to the President and Congress in achieving efficient Government.

Mr. Mollenhoff ignores the fact that we recruit and examine and certify the hundreds of thousands of competent people needed to carry out Government work in the course of a year—work ranging from exploration of outer space to the delivery of a social security check. He ignores or deprecates our concern with the quality of management in agencies, specifically the quality of human or personnel management. He shows no concern with enormously important aspects of properly classifying jobs and setting fair pay for work performed. He apparently is unaware of our important work in labor-management relations, in the training of thousands of employees every year, in the administration of employee retirement and insurance programs, occupational health, merit promotions, incentive awards, and various efforts to improve and perfect all the important elements of personnel administration of the largest single work force in America.

He seems to concern himself with single cases which are not decided as he thinks they ought to be. He has apparently no concern whatever for the programs, or even rules of law, which create the fabric from which these cases arise. These systematic contexts are important in our performance of the duties Congress has placed on us. It is a pity he either cannot, or will not, understand them. So I would like to describe how we understand them.

The rights and equities of employees are given consideration in every aspect of the Federal personnel system that the Commission administers and constantly monitors. Thus, it is no accident that the system itself contains built-in deterrents to the kinds of arbitrary and capricious actions against employees by their superiors which Mr. Mollenhoff believes to abound. Protections of employees rights are spelled out, for example, in regulations and instructions governing position classification and pay, promotions, reassignments, reductions in force, demotions, suspensions, dismissals, and so on.

If an employee disagrees with the classification attached to his job by classification experts he may appeal to seek satisfaction. If he disagrees with an evaluation of his services by his supervisor, he has an avenue of dealing with it. If someone else gets a promotion the employee thought he should get, or if there is a reduction in force and the employee feels he received less than full treatment, he has an appeal.

There are ample avenues of appeal and employees use them. In a substantial proportion of the cases they are successful, and I will provide some statistics on this in just a few moments.

I might add that a supervisor's motivation does not normally turn him in the direction of circumventing this protective system. Rather, he knows that his own success will be measured by the functioning of his section or division, and that good selections for promotion and fair treatment of employees will add to his success. I do not assume, as Mr. Mollenhoff apparently does, that the Government is full of people who run around speaking in conspiratorial whispers, holding star-chamber proceedings, and plotting the falsification and rigging of records. "Star-chamber" is an expression Mr. Mollenhoff uses

often. I wish he would go learn what it means. He apparently is unable, or at least unwilling, to distinguish between "secret" hearings, and the kinds of closed hearings the Commission conducted with apparent approval by everyone for more than 25 years.

No one has ever made the case that the thousands and probably tens of thousands of hearings that were held in the past 25 to 30 years have all been unfair, or that even a great number of them have been unfair, or even that any of them have been unfair, with the occasional exception of the *Camaro* case and a few others that went to court, where particular parts of the procedures were examined with great care by the courts before they decided the procedure should have been accomplished in some other way.

During that period hearing procedures have had to meet changing requirements, which today means that adverse action hearings must be open to the public for those employees who request that they be open. But many employees will continue to want closed hearings, and we will see to it that our closed hearings continue to be fair.

One additional note: More than 50 percent of the Government work force is represented by employee unions. Union members are constantly on the same scene where supervisors supervise. When things go wrong, the unions are not afraid to speak out—and they do. And they don't sound at all like Mr. Mollenhoff.

When an agency contemplates adverse action against an employee—which we define as a demotion in grade, salary, or rank, or any disciplinary action as severe as a 30-day suspension—there are a great many additional safeguards for the employee built into the system.

He or she must be given a 30-day written advance notice. During the period the employee has an opportunity to gather evidence to rebut whatever charges are made against him.

The charges cannot be fuzzy, or general, or concealed. They must be specific and in detail. The Civil Service Commission has reversed agencies hundreds of times on just this point.

During the notice period the employee must be offered an opportunity to appear before a responsible official of his agency, and to make his case orally and in writing. He may have the assistance of an attorney or other representative, and the agency must not put roadblocks in the way of his making an effective defense. We have reversed agencies literally thousands of times simply on procedural defects—that is, failure to give the employee sufficient notice, to clearly inform him of his rights to appeal, or any violation of procedural rules of due process.

Mr. WALDIE. May I interrupt for a moment? If you were convinced that the White House wanted an employee removed for what the White House considered to be legitimate reasons, would that be persuasive to the Commission?

Mr. MONDELLO. It would depend on what the reasons were, I guess. Somebody would have to file charges against that employee and the President, on occasion, does that.

Mr. WALDIE. The President?

Mr. MONDELLO. Yes, sir, I think the *Weiner* case on the law books is the case where President Roosevelt decided that he wanted some-

body dismissed that the agency did not want to dismiss and he dismissed him. The *Eberling* case, which is a relatively old one, where a President wanted to insist that the Secretary of the Treasury rehire somebody the Secretary had dismissed and the Secretary declined to do so, and I guess the man went to court and failed because the law announced by the Court was that the President had no power to issue such an order.

Mr. WALDIE. One of the threads that seems to run through the *Fitzgerald* case, *Mr. Cook's* case and other cases is that when a Federal employee is critical of an administrative policy—and I am not limiting this to the Republican administration because *Mr. Fitzgerald's* case, if my recollection serves me right, arose in the Democratic administration—whenever a Federal employee is critical of administrative policy and particularly when that employee is successful in his criticism, then there is an intimation in these cases that the machinery goes into effect to get rid of that dissenter.

Would you comment? Is there any credibility to that suspicion?

Mr. MONDELLO. I have heard that suspicion voiced.

Mr. WALDIE. Is it dangerous for an employee to speak out against administrative policy?

Mr. MONDELLO. Well, I don't regard it as dangerous if an employee knows what he is about. I think it is very easy for him to bring policy with which he disagrees to the attention of his Congressman or the Congress itself. There is a statute with respect to that on the books which gives him protection. There are occasions—*Fitzgerald* is reputed to be one of them—but I suggest to you that you and I would do wiser to await the outcome of the Civil Service Commission on that case on the record. Mr. Mollenhoff has prejudged that one, but I have not.

Mr. WALDIE. I am not asking you to. I am sensitive to that problem.

Mr. MONDELLO. Okay. Another case is the *Rule* case.

Mr. WALDIE. What about the *Otepka* case where they were seeking to get rid of Otepka because Otepka was contrary to administration policy?

Mr. MONDELLO. The way the case ended up, Mr. Otepka received a decision to demote him one grade for the simple offense of having violated a presidential memo.

Mr. WALDIE. That is the way it ended up, but before it got to that process he went through an awful lot of trouble.

Mr. MONDELLO. Well, I had very little to do with the *Otepka* case.

Mr. WALDIE. I know that. That is why I think it is fair to ask you the question. Is the *Otepka* case an example of harassment of a Federal employee because he was critical of administration policy?

Mr. MONDELLO. I know none of the facts about the wiretaps and all this other business alleged by Mr. Mollenhoff. What I do know about the *Otepka* case is how it ended up, and I was indeed consulted with respect to a legal question in the case by the appeal examiner who heard it. He wanted to know about the continued vitality of that Presidential directive. I told him that I thought it was still in effect and he went on with his business.

But if Mr. Mollenhoff writes about Otepka like he does about Mr. Cook, I am not going to accept what he says just on his say-so.

Mr. WALDIE. Then, generally, your view is there really is no harassment of Federal employees who take contrary positions to administration policy?

Mr. MONDELLO. All I can go by is the cases I see. There is a case in the Supreme Court now—they have accepted jurisdiction of it—involving a fellow named Kennedy, as I recall, who was very critical publicly about his superior, and that is one of the elements in that case. I am grateful to receive Supreme Court guidance on a matter of this sort and I assume you will be very interested in what the outcome is, as we will be.

If I could continue, I will get to that in a moment.

Mr. WALDIE. Mr. Bafalis and Mr. Hillis, please interrupt, by the way, if you feel the necessity.

Mr. MONDELLO. If, after all the procedural safeguards that I described to you have been observed the agency is resolved to take action against the employee, then he has multiple appeal rights. He may appeal within his agency—and every agency is required by the Commission to have an appeals system designed to offer employees fair consideration of their side of the story. He may also appeal to the Commission, or he may appeal first to his agency and then to the Commission. Every agency is required to have an appeal system which, by the way, we are in the process at the moment of probably tearing down as a result of a study made by the Administrative Conference of the United States and by ourselves separately. There are proposals that we published for all the world to see. I think I made them available to Mr. Terry, together with the statistics, which seemed to warrant what changes we are proposing in them. The Commission has not acted on them finally but you will be able to see those for yourselves. Mr. Terry can show you the documents. If you have views about what changes we ought to be making you ought to tell us that, and certainly we will listen.

But there are appellate rights within the agency and to the Commission and you have only to see a few files on appellate cases to know that these considerations are far from pro forma exercises. They are thorough and exhaustive. They include a full-scale hearing, if it is requested. And agencies make every effort to be fair—if for no other reason than that it is quite expensive if the agency is later reversed and required to restore the employee with back pay.

Within the Commission itself there are two levels of review. One is at the regional level, where a trained, professional examiner thoroughly reviews the case, examines all the evidence on both sides, holds a hearing if it is requested, and makes an independent decision. Regional hearing examiners of the Commission are not in any way reluctant to reverse the agencies—as statistics clearly show.

If the appellant still is not satisfied he can then go to the Commission's Board of Appeals and Review in Washington which considers the entire case from the beginning. Furthermore, there's a possibility of having direct personal review by the three Commissioners of the Commission. That is a discretionary review and beyond that, of course, there's the entire Federal court system standing ready to consider the case if the appellant wants to take it there, and the courts have not been at all chary about telling us where to head in.

I know of no other system that provides such a range of protection for employees.

Mr. Mollenhoff calls the Commission's hearings "star chamber" proceedings and he should know there is a big difference:

Our hearings which, though closed, have never been "secret," provide for both sides to present evidence before an impartial hearing officer, for representation by counsel of the employee's choice, for production and cross-examination of witnesses, for full transcripts of proceedings with copies provided to the contending parties, for review and rebuttal of the examiner's preliminary findings before final decision, and there is provision, again, for the further appeals which I have already described.

To the best of my knowledge, no appellant before Fitzgerald has ever raised the issue that a closed hearing denies due process, and I have been informed that our records reveal only one other request for an open hearing prior to the *Fitzgerald* case, with no appeal taken from the denial of that request.

Mr. Mollenhoff makes it appear that hearings in employing agencies and before the Commission are "no win" situations for employees. The facts also belie this.

In fiscal year 1972, employees who appealed directly to the Commission from adverse actions taken by agencies won their appeals—that is, the action taken was reversed by the Commission—in 20 percent of the cases decided. Going back a year earlier to fiscal 1971, 24 percent, almost a fourth, of the employees who appealed adverse actions directly to the Commission won favorable decisions.

Mr. WALDIE. May I interrupt you there. I think that really is not the contention he is making and I don't think the statistics really give much light on it. I think the contention he is making is that when an agency really wants to get rid of a person they can do it. That is not very often. Those are rare cases. But his position is that the system is set up so when that decision is made that we are going to get rid of somebody, they can carry that out. That is what I get out of what he is saying.

Mr. MONDELLO. Well, you can assume, if you will, that in many of the cases where an agency level adverse action against somebody, obviously, in most of the cases it won't be before he testifies publicly about anything; but I assume that Mr. Mollenhoff sees the same focus on this poor little guy who is being pushed against, and it's the same drive; and what I am saying to him is you come up with three cases in 20 years and I am telling you that 20 percent of the time we reverse agencies. We reverse them on the merits. We reverse them on procedures, and then there are the courts to backstop the whole operation.

What I am trying to say to you is we have a system that is important to protect and the system ought to involve the protection of employees. If there are ways in which the Congress thinks we are failing, you can change the system; but we have to be concerned with system. Mr. Mollenhoff has been concerned about three cases or maybe five over in the State Department over which I have nothing to do, and I don't think three cases in 20 years makes his case.

Mr. HILLIS. Let me interrupt here to ask a question. You defend

the closed hearing system. That is part of the system. Can you tell us, did you recommend that a public hearing not be granted in the *Fitzgerald* case when it was requested?

Mr. MONDELLO. Mr. Hillis, the way I am going, I am getting close to the end and I will take up that point explicitly. May I just continue?

Mr. HILLIS. All right.

Mr. MONDELLO. What I would like to do now to conclude is simply take up these two other cases, *Fitzgerald* and *Rule*, which Mr. Mollenhoff underscored in his articles and his testimony. I want to talk about Mr. *Rule* first because his case is most quickly taken care of.

That is a case which everyone regarded as one where the employee testified before Congress and the agency immediately began to push upon him. I testified before the Proxmire committee and I reported that Mr. *Rule*—when the question was asked about where can an employee of his kind who had been in that situation go for good advice about what his rights were, because the problem was really faced very early and was very confused—could have come and consulted with the Commission with respect to his rights.

Within days thereafter, Mr. *Rule* called on me and I wound up—while not his counsel, since I was obviously in an obvious kind of conflict position—making representations on his behalf before the highest levels of the Navy. I will not claim that it was my visits with Navy personnel which alone caused Mr. *Rule*'s situation to become tolerable, as I think it is now. I like to think that the Navy itself, after full study of the facts, moved admirably to correct a situation which threatened to get out of hand.

Forces other than the Commission were also at work, but despite the limited jurisdiction available to us, several offices of the Commission, mine, and the Bureau of Personnel Management Evaluation which has the responsibility of investigating matters of this sort—from the very start of the *Rule* situation, moved quickly and well and apparently persuasively, although the Commission was without power in those circumstances to direct Navy to do anything.

I think you should know, in that connection, Senator Proxmire indicated substantial agreement, on the record with the position I took before him against precipitously augmenting the power of the Commission to step into incipient disciplinary cases in agencies too quickly. It is my judgment that this is precisely what Mr. Mollenhoff would have either him or us do and I think that would be unwise.

By way of preface to the *Fitzgerald* case, let me say that Mr. Mollenhoff has the Commission at a disadvantage when it comes—I am troubled to speak to you about it this morning but I will. If the cost of this has to be that I disqualify myself from anything further because of what I answer to you, so be it. There are other lawyers in the Commission who can do that job. But I think we have a responsibility to maintain the integrity and viability of the appellate process, and a responsibility to respect the rights of privacy of individuals, and we don't ordinarily air the charges that are placed against them or the details of their cases. If we did, we would wash the employee's linen in public, so to speak, and reveal unproven charges which would not only be unfair to the appellant but might dis-

courage other employees from availing themselves of the appeals process for fear of having their reputations tarnished. This has been a basic reason for our traditional position on closed hearings.

Since the details of the *Fitzgerald* case have been so widely publicized, however, I feel justified in going a bit beyond normal limits in speaking of this case, but you all know that it is still under consideration and the Commission has not decided it, so what I will discuss will relate hopefully only to the debate over procedures and the length of time it has been before the Commission.

First, I want to point out that the *Fitzgerald* case has been heard in the Commission and that from the start we were willing to give him a hearing. Because the appeal to the Commission involved reduction in force, Mr. Fitzgerald was presumptively not entitled to a hearing as a matter of right. However, because of his nonfrivolous allegation that the RIF was a guise to cover an adverse action, the Commission—in the interest of what it considered fair and just—decided on its own motion to allow a full hearing.

Mr. Mollenhoff makes much of the delay in Mr. Fitzgerald getting a decision. The record shows that most of the delay is attributable to the litigation of the open hearing issue. Had that issue not been litigated, the decision would long since have been rendered and, in spite of Mr. Mollenhoff's prejudgment about the hearing officer, the decision might well have been and might still be in the appellant's favor.

I have not read too many of Mr. Staiman's decisions, but I have read enough of them to respect him as a fair and knowledgeable and I think independent adjudicator. I am confident his decision will have an obvious relation to the pertinent facts that are on the record in the case.

At one point in his testimony earlier, Mr. Mollenhoff actually said Mr. Staiman permitted him to testify, and that is the fact. Mr. Staiman ruled over Air Force objections that he could testify and he did. I am sure Mr. Mollenhoff was displeased that Mr. Staiman took the trouble to have the issue briefed by both parties before he ruled on it, but this was a serious legal issue upon which conflicting views should have been received. It was most proper to obtain them and he obtained them.

When he did rule, Mr. Staiman ruled against the Air Force and in favor of Mr. Mollenhoff testifying. The question that came up was not merely the question of privilege and the extent to which it might have been seen to exist in the case. A question was also raised with respect to the so-called exclusionary rule where witnesses are ordinarily barred in trials throughout the country in courts so that no witness can sit there and listen to other witnesses testify and then carefully tailor his testimony to suit their testimony and his interest. The question about whether Mr. Mollenhoff, who had been sitting in on the hearings for some time, should be permitted in effect to violate that rule came up for issue and that also was decided by Mr. Staiman.

I think what most displeases Mr. Mollenhoff and seems to be the subject of your inquiry is the audacity of the Commission in litigating the open hearing issue as far as we did. As I indicated before, it

was a case of novel impression—one the courts had not had occasion to pass on before. The issue was for a judicial interpretation. Although my personal preference tends, and tended then, to open hearings wherever they make sense, I was totally willing to advocate the Commission's legal position on this totally respectable legal argument. I note that the Justice Department was equally willing.

When the case was decided by the Court of Appeals—and we are now a year and some months later—I initially urged the seeking of certiorari in the Supreme Court. I was the Commission's lawyer and was tending to its interests. But other events concerning adverse actions were also getting attention, and both the Administrative Conference of the United States and the Commission itself were studying the open hearing issue as a policy matter.

One of the basic thrusts of our brief, both in the District Court and the Court of Appeals, was that Congress, we thought, had given to the Commission the power to decide that kind of policy matter in such cases. Because of my knowledge of the course of these studies, I had concluded that the proponents of open hearings at the employees request would be successful, so that the issue would lose the public importance characterization which is necessary for Supreme Court review. The statute says that the Supreme Court should review on certiorari cases of public importance.

At that point, and prior to the Solicitor General's decision, I withdrew our support for further judicial review of the issue.

I did not come here today to claim that we don't make mistakes in the Civil Service Commission or that we run a perfect system. I assume we don't and I personally spend all my working days trying to improve that system. I came because the system itself operates in a meaningful way, in my judgment, and even in these three cases you have good indications that the system has worked. All three of these individuals—Cook, Fitzgerald, and Rule—received some protection from the system.

On Cook, a court passed on the case and declined to disturb our ruling. The rule about who can see medical files was apparently relied on by his doctors to the satisfaction of the court.

The *Fitzgerald* case is still in process and due process is being dispensed. He knew always that he could have a full hearing, and in response to the court's ruling, he is getting the open hearing he wanted.

Mr. Rule is happily at work, in part at least, because of our early intervention in the matter.

If these three cases are all that Mr. Mollenhoff can come up with in 20 years study, the system as a system is doing pretty well.

Mr. WALDIE. Do the members have questions?

Mr. HILLIS. Of course, Mr. Mondello, you do quite a job here defending the system. One of the things that concerns me about the system is that, as you said earlier, the Commission really is the executive's employment branch, the executive's representative.

I wonder, first of all, if the review part of the facility should not be separate from the review part which took part in the employment of the employee in the beginning. I wonder, too, in these elaborate appeal procedures as you said, with the Federal courts

standing by, if the government ought to perhaps provide the employee with some adequate means of representation. This sort of appeal has to be a frighteningly expensive thing for an employee to take on the government or to take on the system.

Mr. MONDELLO. I don't think it is. It keeps the employee from work, obviously, but he is given official time for that.

Mr. HILLIS. I am a fairly new Member of Congress, but I inherited as a constituent Mr. Cook, and he used to come to our office frequently and, regardless of the merits—I know little of the merits of the case—but you could see the decline in this man's financial position during the long, drawn-out fight that he carried on with the Government. I am told he even had to walk back and forth from out in Alexandria to get into Capitol Hill to talk to people.

That is hardly an adequate balancing of economic forces, when some employee wants to take on the system.

Mr. MONDELLO. Let me talk about that kind of balance. Back in July 1, 1968, I had seen the *Cook* case. I had seen other disability cases where the agency was the one that was acting to initiate a disability. They were a rare breed of case. There never have been very many of them. I saw nothing amiss in the *Cook* case. I am not a doctor, but I saw the weight of the reports in the *Cook* case and I was not disturbed by the outcome of it. I dealt with the case thereafter so I was the one who was either giving documents out or refusing to, and I take full responsibility for how that role went.

But there were other cases that troubled me where I thought it would have been far more useful to the employee that he have some cross-examination possibility; that it might be advisable to have doctors take the stand as they do on occasion in social security cases, for example, in the disability program.

Then I looked around in the Commission to see whether I could pull this off, because I had only been there a few months. By July—I got there in April—I found out the Commission had considered and apparently put aside a full set of regulations—which represented what was then due process for matters of that sort—because of a fear of making it too difficult to get rid of a man by the disability ruling, the medical mental imbalance rule. Because, you see, when a man is imbalanced in this way he may act aberrantly on the job and the supervisor at that point on the job has two main choices: If he has got any sense and compassion in him at all, he will sense that perhaps the individual is imbalanced and perhaps needs medical attention, and that is why you send him for a fitness examination. If he is callous or insensitive or downright inhuman, all he has to do is take advantage of the same aberrational conduct, ignore any compassionate treatment of the employee, and fire him for cause, for the things he has done.

If he does the latter, the employee is dismissed through a different set of procedures and he gets no disability annuity, and I think that is intolerable.

We were troubled when we set up rather heightened due process procedures for the disability program starting in July 1, 1968, that we shouldn't turn that screw too tight and make it difficult in the sense of having extended hearings, no matter which way you turn,

if you are a supervisor, because I wanted to keep all the pressure on supervisors to be compassionate and to let doctors make the kinds of judgments that doctors can make a hell of a lot better than supervisors.

Now, you talk about systematic balancing, that is what you are dealing with at a point like that. Mr. Mollenhoff likes to talk about the impecunious finances that Kenneth Cook had. That is a function of his length of service and what the disability program that Congress authorizes permits us to pay, and he got the full benefit of that. But if the *Cook* case was rightly decided on the merits, I don't know what we and the Commission can do further about that. Certainly the employee is in the switches when he gets fired. I am relatively well off compared to Mr. Cook, but don't have any doubt in your mind that if the forces of government decided that, for whatever reason, I was to go, that I wouldn't have difficulty making out financially for a while, and maybe forever. This is a common problem and we have set up procedures to see that the difficulties that strike employees doesn't hit too hard; and the adverse action program which the Commission is today designing is expected to see that the screws are taken off the employee when they are on him too tight too early in the game.

The biggest single question that is being discussed in this connection, and this is quite evident from the documents I made available to Mr. Terry, is whether there should be pretermination hearings across the board. There are two sides to that coin, too, but in the absence of a congressional statute that directs how we should do it, we are going to do it by exercising the best judgment we can, and that's about the size of it.

Mr. BAFALIS. I don't have any questions.

Mr. WALDIE. I have no questions.

Mr. Mollenhoff?

STATEMENT OF CLARK MOLLENHOFF

Mr. MOLLENHOFF. I am delighted to get back here before this microphone and clear up a few of the misconceptions my initial testimony conveyed. It was not meant to convey that everything that the Civil Service Commission does is wrong. It was to convey that there are enough cases, provable cases of negligence, for concern from the standpoint of the operation of the government.

This massive report, "The Spoiled System," which was done by Robert Vaughn with the Nader group, represents the kind of judgments that demonstrate this is not just Clark Mollenhoff's concern. It is the concern of everyone who has looked into it. The size of the problem itself defies going into. There are thousands of cases. It would be impossible for me to go into all of the cases.

There is an attitude and an atmosphere that permeates the civil service, and among the civil service workers this is apparent, that you don't buck the system. You can't win against city hall, and that it's stacked for the personnel offices in the various shops.

Now, in the *Gordon Rule* case, I must say that everything I heard was that the Civil Service Commission was doing an excellent job;

that Mr. Mondello went out of his way to help Gordon Rule, which he was well advised to do. One must take that in context, though, with all of the hell that had been raised on the Fitzgerald case and the real pain that the Fitzgerald case was to the Civil Service Commission, to the Air Force, and to the whole blasted Government through this period of time, that Mr. Mondello's movements at that time could have been motivated by good will or could have been motivated to keep himself out of a new big bag of trouble. I am delighted to know that he personally favored open hearings during that period of time when he was so vehemently arguing with me that open hearings would bring the press and the public in and would make it more difficult to get to the truth of the matter. That was the most amazing argument that I had ever heard.

With regard to the access to Mr. Cook's file, when I was at the White House, Mr. Cook came to me at the White House as a citizen who felt he was wronged by an agency of Government. He was trying to obtain access to certain records. At that stage he had information or his lawyer had information that there was an Air Force psychiatrist who had ruled that he had no disability. That, to me, seemed to be the guts of the issue and it didn't make any difference how many people rubber-stamped this thing along the way. If the top psychiatrist of the Air Force, a qualified man, made the judgment that there was nothing to the initial report, that put Cook on the way out, it didn't make any difference to me how many people intervened because I was aware of the tendency of the Government and the Government doctors to come in and put a rubber stamp on the views of subordinates.

Mr. WALDIE. Mr. Mollenhoff, we have a quorum call. I will come back.

Mr. BAFALIS. I would like to leave with a comment. There are several of us, Mr. Mollenhoff, who have cosponsored a bill called "Government in the Sunshine" which would open this kind of hearing up with all other agencies of Government. We would appreciate your support at public hearings.

Mr. MOLLENHOFF. I am for it.

Mr. WALDIE. We will be right back.

[Recess.]

Mr. WALDIE. All right. Mr. Mollenhoff, you will please continue.

Mr. MOLLENHOFF. Well, I was mentioning this study by Ralph Nader's group, "The Spoiled System," and it certainly is a full documentation of complaints. I felt, as I stated earlier—which Mr. Mondello ignored—that there are dozens of cases that I have knowledge of. I was addressing myself to three specific cases, and I might say, with regard to the *Rule* case, where I would approve what they did in that case and it had a proper solution, I am not sure that all civil servants would have available that particular remedy of advice from the general counsel.

Now, having something comparable to that. I would think that creating an ombudsman for the civil servants independent of the Commission and with an independent staff away from the general counsel's office there would be no tendency to cover up for the agency. There would be every bit of access from a statutory power to the

records of the Commission, but the same kind of confidentiality to support what they received from the standpoint of medical records and the like, as would prevail as far as the Commission is concerned, with the provision that the employee himself can make exceptions to this in specific cases. In other words, in the *Cook* case, he had information that indicated that the top psychiatrist of the Air Force was on his side. He had given testimony and had made a report that was on his side of the whole issue, and he was barred from that by rulings of the Commission and he came to me at the White House and I had conversations with him and I think I had some conversations with his lawyer at that period of time. It was in response to a request from the employee, Mr. Cook, that I asked for the file because he had spotlighted and pinpointed the key thing.

Cook was being barred from a report that supported his position and it was not just another one of these little reports down the line or another board rubber stamping what the agency had done in the first place. It was a contrary report that was vital and it amazes me that Mr. Mondello didn't put his finger on that as the key issue in the case.

Mr. WALDIE. Was that case appealed to the courts?

Mr. MOLLENHOFF. It was appealed to the courts but the courts in these areas are reluctant. I think the Congress has put some statutory barriers on what can be made available to the employee himself, and I think you should review that and see how it has been applied over the years. I am not familiar enough with it to have any other than just a recollection out of the back of my mind—it either states specifically or has been interpreted as meaning or has had regulations written by the Commission that represent a true barrier to the employee getting his record. The minimum he should have is his record, or his doctor should be able to get his record or his lawyer should be able to get his record, particularly in these medical cases, I say there are only a few cases that I am aware of in the Civil Service Commission where there are these questions. I know of a good many cases up at the State Department, Foreign Service, where the same kind of problems arise and I know from talking to people with the American Federation of Government Employees and miscellaneous people who have been discharged that one of the best gimmicks there is is to send an employee down to the department doctor. Those who are wise in the ways of the bureaucracy don't go to the department doctor until after they have gone to a doctor of their own choosing on the outside.

Mr. WALDIE. What is the response to Mr. Mondello's position that many of these cases could be handled by simply terminating the person for the conduct that really had a medical basis but they seek a more compassionate means of disposing of the case so they attempt to medically establish his inability to perform so he can retire on a disability?

Mr. MOLLENHOFF. Well, in being so compassionate, they should make sure that the employee has some understanding of that compassion. I might say that the Air Force, in making the point with regard to Mr. Fitzgerald, wasn't bringing the charges of security violation against him and it wasn't bringing the conflicts of interest

charges, because they wanted to be kind to him. They didn't want that kind of a blemish on his record for future employment. At the time they were telling me that they already knew in the Air Force Office of Inspections it was untrue.

Mr. WALDIE. So, in other words, you discount that contention?

Mr. MOLLENHOFF. I discount it completely. There may be instances that he can cite where it is used for compassion. I would say that in the large number of cases, though, that the bureaucratic personnel managers will use it otherwise.

Mr. WALDIE. Well, is a medical grounds for discharge easier to establish than grounds of inability to perform?

Mr. MOLLENHOFF. I'm not so sure that it is.

Mr. WALDIE. Why would they go that route if it's more difficult, if they are motivated as you say by improper motivations that have not had their basis in the—

Mr. MOLLENHOFF. If they are motivated by a desire to make a phony record so the man can retire, that in and of itself is a blemish on the Commission's motivation because what they are doing is putting a medical report on a man, raising questions about either his physical ability or his mental ability, when those would be barriers to a subsequent job.

Mr. WALDIE. And if that is more difficult to establish, why would they simply not go on the basis that his conduct warrants his discharge?

Mr. MOLLENHOFF. I can't tell the motivation of all of the people in civil service.

Mr. WALDIE. But you were speculating.

Mr. MOLLENHOFF. I am saying here today what one can say, that if you have grounds for firing a man, you should use those grounds and not dream up something different.

Mr. WALDIE. So those, in effect, the grounds are that his conduct is erratic. Now that's grounds for discharging him because he is not performing well. But suppose, in addition, the erratic conduct is a result of the medical problem. Should you not seek to have him discharged on the basis of a medical problem to get disability for him?

Mr. MOLLENHOFF. I would think, if you had that kind of a case, but you would have to see all of the factors before arriving at what was the just thing to do under the circumstances. My experience does not indicate that most of the personnel managers in the government give that much time to—

Mr. WALDIE. If they seek a medical discharge of an employee and the employee resists it, they are probably seeking the most difficult sort of discharge to establish, are they not?

Mr. MOLLENHOFF. I think that is right.

Mr. WALDIE. It seems strange they would do that.

Mr. MOLLENHOFF. Unless they got a pet doctor in their shop who they don't have to concern with the facts and that's not idle.

Mr. HILLIS. Mr. Chairman, you touched on a point I would like to pursue a little bit further. Statistics were given here that some 20 percent of these cases are reversed upon appeal. Would it also be a safe assumption or would you have any information on how many

employees, in light of the system that Mr. Mondello outlines here and its equity and equality, just give up and never fight to begin with? How many don't resist?

Mr. MOLLENHOFF. Well, I'm sure that the large number don't resist. There is no way of arriving at statistics on that. Ralph Nader, in this study (which amounted to interviewing hundreds of people around in government and doing many interviews with the Civil Service Commission itself and examining records) came to the conclusion that there is a depressing pattern and atmosphere that permeates government which most people in government just don't resist. They do what their supervisors want them to do. Most of the time that is probably all right, but when there is so much need for independence and integrity in government where officials should resist rubber stamping what their superiors want, there should be at least more protection than there is for those who are independent.

Mr. WALDIE. Gentlemen, we must adjourn these hearings in order to answer the call of the House.

We would be pleased to receive any further comments you may have in writing. Thank you.

The subcommittee stands in adjournment.

[Whereupon, at 12:45 p.m., the hearing was adjourned.]

RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

WEDNESDAY, APRIL 24, 1974

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 9:40 a.m., in room 210, Cannon House Office Building, Hon. Jerome R. Waldie (chairman of the subcommittee) presiding.

MR. WALDIE. The subcommittee will come to order.

Today's hearing is a continuation of those held last year on the right to privacy of Federal employees.

Today we plan to explore the various ways in which the executive agencies have invaded the privacy of their employees and also the means through which we can prohibit such invasions.

Two very important aspects of this are the right for an employee to see the files which an agency keeps on him or her and, also, the establishment of a Board on Employees' Rights through which an employee may seek redress for actions taken by the employing agencies which are specifically prohibited by legislation on Federal employees' right to privacy.

I have been made aware of an investigatory network which is maintained and used for the express purpose of obtaining the most personal, intimate, and private information about employees. The only person not permitted to see this information is the subject. Very often, such information is used by an agency or an official thereof as a basis for firing a qualified employee who is, perhaps, viewed by that agency or official as a "troublemaker."

Under the circumstances outlined above, it is no wonder that we have found it necessary to conduct these hearings. It is my hope that through these hearings we may obtain the information necessary to pass truly effective and equitable legislation.

Our first witness is Mr. A. E. Fitzgerald. Mr. Fitzgerald, will you come forward, please. Mr. Fitzgerald is Deputy for Productivity Management, Department of the Air Force.

MR. FITZGERALD, I have your statement before me, and I want the record to make clear that your testimony is not volunteered, that we requested that you come before the committee to give to this committee information that I deem important and necessary for the completion of our records.

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**STATEMENT OF A. E. FITZGERALD, DEPUTY FOR PRODUCTIVITY
MANAGEMENT, DEPARTMENT OF THE AIR FORCE**

Mr. FITZGERALD. Thank you.

With your permission, I will deviate from time to time from the prepared statement. And please feel free to interrupt if I fail to make any point clear.

Before I get into the substance of my testimony, I want to explain further my status as a witness. I am now a civil servant in the Department of the Air Force. The chairman's invitation to testify came to me in my official capacity and I am responding accordingly. I have submitted this statement to my superiors in the Air Force. By copy of the statement, I have suggested that any questions of fact they might have been made known to me, given directly to you, Mr. Chairman, by other witnesses, or both. The opinions expressed are my own.

Some years ago, Mr. Chairman, during 1968 and 1969, I got into a great deal of trouble following my congressional testimony concerning undisclosed cost overruns and other weapons systems procurement problems. Many high officials were offended by my testimony and the ensuing publicity.

In the aftermath, I came to appreciate the wisdom of one of our sages. Adm. Hyman Rickover has said many times, "If you must sin, sin against God, not against the bureaucracy. God may forgive you, but the bureaucracy never will."

Among other reactions to my congressional testimony, I was subjected to a secret investigation by the Air Force's Military Office of Special Investigations, headed at the time by Brig. Gen. Joseph Cappucci, who is now head of the Defense Investigative Service. According to information subsequently obtained from General Cappucci's files, secret informer T-1, supposedly the instigator of the snooping project, was outraged because the bad news of congressional investigations, for which I was blamed, made "the officers in the Air Force look bad."

If information made available to date by OSI is correct, General Cappucci's investigation was kicked off very shortly after Dr. Robert Seamans, then Secretary of the Air Force, launched a bitter personal attack on me in secret hearings before the House Armed Services Committee. Among other things, Dr. Seamans accused me of leaking confidential documents to Congress. Air Force Regulation 205-1 (C-5) stated:

The use of the classification "confidential" shall be authorized by appropriate authority only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interest of the nation.

In light of this, Dr. Seamans' charge against me was very serious. The late Congressman Mendel Rivers, then chairman of the Armed Services Committee, was presiding at the secret hearing. Chairman Rivers, apparently greatly disturbed by Dr. Seamans' charges, was moved to remark:

If I had a fellow like that in my office, he would have been long gone. You don't need to be afraid about firing him.

Mr. WALDIE. May I interrupt for a moment. Chairman Rivers was probably correct, because the limited protection Federal employees have in the executive branch is enormous compared to that the employees in the legislative branch have. They have none.

Mr. FITZGERALD. But the point is, Mr. Chairman, they enter into their contract knowing they have none. In the executive branch you assume it's present.

Mr. WALDIE. I think the other point is that the House Armed Services Committee Chairman apparently gave the Secretary of Defense some comfort in urging toward and approving the action he took.

Mr. FITZGERALD. Yes, sir, I think there is no question about that.

Now, Dr. Seamans' charges were totally false. All the documents which he had in mind, according to his later sworn testimony, had been transmitted to Congress through official Air Force channels. None were confidential.

Because the Armed Services Committee hearings were secret, I did not get to read Dr. Seamans' false charges until the hearing transcripts were published nearly 5 months later. By then, the damage was all but irreversible. My name had been thoroughly scandalized and plans to fire me, as suggested by Chairman Rivers, were moving to fruition.

Meanwhile, I was very fortunate to learn of General Cappucci's clandestine investigation.

Mr. WALDIE. Can you hold on just a minute.

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. I have here in my possession a memorandum "For the President," dated December 5, 1969, from Clark Mollenhoff, subject, "The Fitzgerald Case", and I will introduce it at this point for the record, this particular memorandum.

[The document referred to follows:]

THE WHITE HOUSE,
Washington, D.C., December 5, 1969.

Memorandum for the President:

From: Clark Mollenhoff.

Subject: The Fitzgerald Case.

The Administration position on the Fitzgerald case is untenable and can only become worse as the Proxmire investigation proceeds.

The Fitzgerald case has come under the broadest editorial attack from conservative as well as liberal newspapers. These attacks range from those in the Washington Post and the Milwaukee Journal on the liberal side, to those in the Omaha World Herald and The State newspaper published in Columbia, South Carolina, on the conservative side. Conservative writers compare it to the Otepka case.

Fitzgerald is pictured as a man "fired for giving truthful testimony to Congress." These attacks come from conservative Republicans to liberal Democrats. The closer the record is examined the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous on its face. Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.

See attached suggestion for Presidential action and position.

Attachment.

SUGGESTED PRESIDENTIAL POSITION ON THE A. E. FITZGERALD CASE

The Administration has no quarrel with the Senate Subcommittee report on the C5A program asserting that the prior Administration "has not been adequately controlling military spending." It can be noted that Defense Secretary Laird stated he is "determined to ensure that past mistakes in the procurement of this transport aircraft will not be repeated."

The following points should be made:

1. C5A cost problems were inherited from the Johnson Administration, and Fitzgerald's testimony on cost overruns was no embarrassment to the Nixon

Administration. Conscientious efforts are being made to correct the problems pointed up by an Air Force team that included Mr. Fitzgerald.

2. There is no reason for the Nixon Administration to retaliate against Fitzgerald. Air Force Secretary Robert Seamans says there was no relationship between Fitzgerald's testimony of November 1968 and the reorganization decision to abolish his job in October 1969.

3. There is an unfortunate erroneous public impression that Nixon Administration appointees abolished Fitzgerald's job as retaliation for giving testimony on scandals of a prior Administration. This arises from an extensive record on complicated contract decisions and personnel decisions.

4. To correct the record and to prove good faith. I am directing the Secretary of the Defense to offer Mr. Fitzgerald a proper post to use his talents in the fight to control Defense spending.

It is important to take this extra step to avoid any mistaken public impression that the Administration would be a party to retaliation against a man who gave testimony dealing with Defense waste. The job must meet these tests:

1. A bonafide job offer, not make work.

2. On the same level.

3. In an area where old personnel frictions arising from the long controversy on C5A will not impede Mr. Fitzgerald's future contribution.

Mr. WALDIE. In that memorandum, he says—let me read portions of it because it bears upon Seamans' testimony, apparently.

Mollenhoff describes Seamans' testimony in his memorandum to the President in these words:

The closer the record is examined, the worse the record looks. The testimony of Air Force Secretary Robert C. Seamans and Assistant Secretary Spencer Schedler appears ludicrous.

Is that the testimony to which this memorandum makes reference, the testimony to which you have just referred?

Mr. FITZGERALD. I believe that he was referring to this testimony and also to subsequent testimony by Secretary Seamans which he had to retract, at least partially retract the false charges, before the Joint Economic Committee. Hearings before the Joint Economic Committee were held into the circumstances of my firing.

Mr. WALDIE. He goes on to say:

Even if the testimony is true, it still lacks credibility on dozens of points. It will be virtually impossible to persuade any responsible Republican to defend what has been done. Presidential defense of this record could be disastrous.

I'm sorry: I missed precisely where Assistant Secretary Spencer Schedler had apparently testified in his testimony which Mollenhoff describes "appears ludicrous on its face."

Where was that?

Mr. FITZGERALD. To my knowledge, Assistant Secretary Schedler's only testimony on the subject was before the Joint Economic Committee hearings. I am quite sure that Mollenhoff was familiar with both Dr. Seamans' testimony before the House Armed Services Committee as well as that of Secretary Laird, whom I am not sure whether we mentioned or not, and also the subsequent appearance by both Dr. Seamans and Mr. Schedler before the Joint Economic Committee. And I subscribe to his characterization as ludicrous.

Mr. WALDIE. Okay.

Mr. FITZGERALD. I said that I had been very fortunate to learn of General Cappucci's clandestine investigation. Very often, the victims or subjects, as they are called, never know what hit them. They never understand what happened to them until too late.

I heard through friends that a so-called security agent of a large west coast aerospace contractor had bragged that his firm, bruised by my congressional testimony, was cooperating "with DOD" to "get

Ernie," meaning me. My informants said an investigation was under way to establish my: (1) Relationship with women other than my wife (2) overuse of alcohol (3) use of drugs, or (4) homosexual contacts.

Now, even then, back in 1969, I was too old, too poor, and too busy to have serious problems with items (1) and (2), the women and the booze. Items (3) and (4), drugs and homosexuals, had never appealed to me. Nevertheless, I was greatly concerned about the OSI investigation. I had enough experience with such matters to realize that results of investigations could be slanted and that selective leaks of the so-called intelligence to important people could utterly destroy a person. Accordingly, I passed the word through my friends that I urgently needed more information about the snooping project.

Thanks to the fact that there were some honest and courageous agents in OSI, plus fine work by Senator Proxmire, Congressman William Moorhead, and their staffs, I learned a good deal about the snooping.

A sample letter to Congressman Moorhead said:

I read recently of your concern regarding the manner in which the Air Force has reacted against an employee, A. Ernest Fitzgerald, who acted in the best interests of the United States.

I believe you will be interested in a report of another attempt by the Air Force to seek retribution against Mr. Fitzgerald. The Air Force Chief of Staff reportedly asked General Capucci, Director of the Air Force Office of Special Investigations, to conduct an investigation of Mr. Fitzgerald very much in the manner that General Motors hired a private investigator to investigate Ralph Nader. General Capucci is said to have conducted a surreptitious investigation in June 1969 but failed to uncover any unfavorable information that could be used against Fitzgerald. An attempt was made to disguise the investigation as a background investigation even though Mr. Fitzgerald already had a security clearance and there were no allegations of wrongdoing. (OSI file IIQD 24-12052)

This, incidentally, is key to any subject or victim, to know the exact file number of the investigation he is being subjected to. Otherwise, the gumshoes plead ignorance and say they have never heard of it. The writer concluded:

I am confident that Congress has not authorized the Air Force to conduct investigations solely for the purpose of "getting even" with an employee who has embarrassed Air Force officials.

Congress may not have authorized such investigations, but there is nothing to stop such an illegal order from being carried out to the detriment of the subject. The military may order such an investigation any time they wish and may slant the results as they wish.

The easiest way to distort an investigative file is by careful selection of material left in the file. We have hard evidence of how this was actually done in General Cappucci's investigation of me.

Mr. WALDIE. May I stop you a moment?

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. Do we know, or are you speculating how General Capucci received the order to investigate you? Is there documentary evidence of his being directed by the Chief of Staff of the Air Force, or is there other evidence?

Mr. FITZGERALD. There is sworn testimony, testimony taken under oath at the Civil Service Commission's hearing on my firing, on this subject, Mr. Chairman.

The testimony is conflicting. General Cappucci testified that he undertook the project on his own. Gen. Duward Crow, in other testimony, testified that the project had probably been kicked off in his office at a meeting with another general officer.

Mr. WALDIE. Who is he?

Mr. FITZGERALD. Gen. Duward Crow at that time was Lieutenant Controller of the Air Force. He is now Assistant Vice Chief of the Air Force.

According to his testimony, he received allegations in a meeting in his office attended by himself, by Gen. Harold Tubner, by a Col. Hans Driessneek, and by a highranking civilian, Mr. Eugene Kirshbaum.

General Crow testified that he subsequently passed the information to the Office of the Chief of Staff and assumed that action was the genesis of the investigation.

This, incidentally, General Crow's version of how the thing got started, also matched other information, such as the letter I just quoted part of.

Mr. WALDIE. But if it went from General Crow to the Chief of Staff and back to Cappucci, Cappucci would have had some sort of order from the Chief of Staff, would he have not?

Mr. FITZGERALD. I believe their regulations at that time required that they have an order in hand or, if they responded to a verbal order, that they get written confirmation of it.

Mr. WALDIE. Cappucci says he did not have an order in hand, did not respond to a verbal order, but undertook it on his own?

Mr. FITZGERALD. That was his sworn testimony.

Mr. WALDIE. That I don't fully understand. Does he say he just read it out of the paper and was concerned and decided to find out if any of these four categories could be proven?

Mr. FITZGERALD. General Cappucci has given several versions of this, but the one I heard him give under oath was essentially that volunteers more or less wander into the office and give them these stories. I don't believe that was the case in this instance.

Mr. WALDIE. Now, one final question—you may be coming to it in your testimony. At this point, one final question: Have you had access to the file that General Cappucci compiled as a result of this investigation?

Mr. FITZGERALD. Only to portions of it, and then the summarized and bowlderized versions. I will come to that later in the testimony.

Mr. WALDIE. All right; thank you. You may continue.

Mr. FITZGERALD. I suspect that OSI knew from the start that Secretary Seamans' charges regarding my leaking confidential documents were groundless. I am sure that they also concluded quickly that I wasn't much of a swinger. However, they did get statements from their secret sources, identified only as T-1, T-2, T-3, and T-4, which they chose to interpret as conflict of interest charges against me.

I should emphasize here that my lawyers and I have never seen the complete, unedited files on me. We are dependent for our information on portions of the file wormed out of the Government over the past 4½ years.

When the referred upon completion reports, as the field reports are called, from General Cappucci's first round of field investigations

came back "negative," that is, clearing me, the field agents were told to try again.

Part of the second effort to get the goods on me was disguised as a precontract award survey of the small consulting firm I had headed prior to joining the Air Force. The tipoff to some of the honest agents that this was a cover operation was the fact that my former firm was then out of business, a victim of the group's own excess of zeal in smiting big-spending military contractors. As Watergate has taught us, incompetence of police state agents is free society's best defense at present. I'm sorry to say I don't think we can depend on that at all times.

The second round of RUC's also came back "negative." However, even the fact that the charges against me failed to hold up did not slow down the spreading of the charges. Secretary Seamans testified under oath that General John P. McConnell, then Chief of Staff, told him I was involved in conflicts of interest in June 1969, which was shortly after the Cappucci investigation was supposed to have gotten underway. This was a key event, and highlights a point I hope this subcommittee will consider in writing protective legislation.

Once the Chief of Staff of the Air Force takes a "position" on any question, that "position" is very much like an article of normative or religious truth to subordinates. "Supporting the Chief's position" is the natural, the expected, and the required thing for subordinates. The Chief of Staff's "position" that I was a bad guy would naturally provide strong motivation to seek out and preserve so-called intelligence supporting the Chief's position, and to suppress and discard evidence to the contrary.

This was, in fact, what happened. After existence of the secret file on me was reluctantly acknowledged by the Air Force, bowdlerized excerpts from the file were shown to Senator Proxmire and Congressman Moorhead. I also asked to see the file but was denied. Fortunately, Senator Proxmire and Congressman Moorhead told me about it.

Mr. WALDIE. May I interrupt you here?

Mr. FITZGERALD. Yes.

Mr. WALDIE. On what basis was the denial asserted?

Mr. FITZGERALD. I believe the statement of Lt. Col. Clifford LaPlante, who handled the matter with Senator Proxmire and Congressman Moorhead, was that, "It's against our policy."

I made a strong argument saying that I felt I should be able to face my accuser. It is very difficult to defend yourself against vague charges by T-1, T-2, T-3, and T-4.

Mr. WALDIE. Was there a regulation upon which they were acting when they refused you access to that file?

Mr. FITZGERALD. He did not cite one. I have subsequently learned of regulations which—

Mr. WALDIE. Can we have those cited? Can you give me those?

Mr. FITZGERALD. I can get them, Mr. Chairman.

Mr. WALDIE. Would you please, at a subsequent time, provide for me the regulations that exist that permit them to deny access to a person in the position in which you found yourself, to deny him access to that file.

Mr. FITZGERALD. The regulations that I subsequently became relatively familiar with, in fact, gave the Secretary of the Air Force and

the Chief of OSI broad discretion on whether to reveal the information. But to continue——

Mr. WALDIE. Now, does the revelation of the information to Proxmire and Moorhead—I presume that is consistent with the regulation and within the discretionary terms of their power.

Mr. FITZGERALD. I suppose so.

Mr. WALDIE. That is really a great deal of a key to what we are inquiring into, as to whether you as an employee, or those in similar circumstances, shall have access.

Mr. FITZGERALD. I say, "I suppose so," because I know of nothing which says they have a right—even a regulation, much less a statute—that they have the right to falsify the record that they show someone. And this was in fact done, as I shall describe.

Mr. WALDIE. All right; please proceed.

Mr. FITZGERALD. The file that Senator Proxmire and Congressman Moorhead saw contained newspaper clippings, a television transcript, and rewritten versions of the derogatory comments of T's 1 through 4. These interviews had been rewritten and "summarized," as they expressed it, months after they took place. Names of the sources were deleted. The file had been doctored further.

It has now been established that a favorable interview with former Assistant Secretary of the Air Force, Dr. Leonard Marks, my former boss, the exonerating field reports, and reports of investigations by Dun & Bradstreet were left out. My lawyers and I believe there were additional omissions, a premise we are attempting to test legally.

At the time, the Air Force would only own up to leaving out the Marks interview, and not even that until after blasts from Senator Proxmire, Congressman Moorhead, and columnist Jack Anderson. The official excuse was that the investigators "forgot" to include the interview favorable to me in the file shown on the Hill. General Cappucci later swore he did not know why the favorable interview was left out.

More than 3 years later, when questioned by my attorneys at my Civil Service hearings, General Cappucci testified under oath that he had used Dun & Bradstreet in New York and Boston in investigating me. He also testified that he had destroyed the favorable field investigative reports while retaining the charges against me in my files.

The Civil Service Commission, in their decision restoring me to duty, commented, "We find it unconscionable for OSI to have shown only the derogatory allegations without also showing the results of the investigation which laid to rest these allegations."

Mr. WALDIE. Was the testimony of General Cappucci in your Civil Service hearings that he destroyed, favorable field investigation reports?

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. And what did he base that action on?

Mr. FITZGERALD. My recollection is that he said he always did that; it wasn't just picking on me.

Mr. WALDIE. He always destroyed favorable reports on those they were investigating?

Mr. FITZGERALD. That is my recollection of it, Mr. Chairman.

Mr. WALDIE. Now, let me ask further: Is that transcript available to you of that hearing?

Mr. FITZGERALD. It certainly would be available to you. It is on file at the Civil Service Commission; yes, sir.

Mr. WALDIE. Well, we'll seek that. It is just an incredible statement.

Mr. FITZGERALD. This is why I said "I suppose" when you asked me if his disclosure was in accordance with the regulations. I don't read any of that into the regulations myself, that he has the right or any authority whatever to falsify Government records. And this is what this amounts to.

Mr. WALDIE. You mean by selective disclosure?

Mr. FITZGERALD. Yes.

Mr. WALDIE. Of course.

Mr. FITZGERALD. And by editing and summarizing the charges. I don't know what those people said, really.

Mr. WALDIE. But even more incomprehensible would be that anyone would have the right or the authority to destroy evidence, whether it is favorable or unfavorable.

Mr. FITZGERALD. Right.

Mr. WALDIE. The destruction of it would seem to me to be not only improper, but illegal.

Mr. FITZGERALD. Well, as a layman, not a lawyer, I would certainly agree with you, whether or not their regulations permit them to do that. If the regulations permit that, I submit that they are wrong.

Mr. WALDIE. It may be that sinister forces are more widespread than we have heretofore believed.

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. May I just make a note here. Would the staff make a note to get me a copy of General Cappucci's testimony in the Civil Service hearing.

Please continue.

Mr. FITZGERALD. According to sworn testimony by Clark Mollenhoff, former special counsel to President Nixon, Air Force officials continued to peddle the charges against me months after General Cappucci's agents had cleared me. Mr. Mollenhoff testified that Assistant Secretary of the Air Force Spencer Schedler and his aide, Col. Dudley Pewitt, called on him in his White House office in November of 1969 to explain the so-called "real" reasons I was being fired. Mr. Mollenhoff swore that Schedler and Pewitt said the "real" reasons I was being fired were that I was guilty of conflicts of interest and security violations, not to save money, as had been officially announced to the accompaniment of considerable wry mirth.

Both Secretary Schedler and Colonel Pewitt refused to testify about their contacts with the White House, invoking "privilege" to avoid telling what they knew.

Mr. WALDIE. Well now, where did they invoke that privilege? At the Civil Service Committee's hearings?

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. When asked about the conversation with Mr. Mollenhoff?

Mr. FITZGERALD. Or any other contacts with the White House.

Mr. WALDIE. But including Mr. Mollenhoff?

Mr. FITZGERALD. Including Mr. Mollenhoff.

Mr. WALDIE. They refused to testify whether that was a true conversation as Mr. Mollenhoff had related it or not?

Mr. FITZGERALD. Right. And Colonel Pewitt was asked to identify Mr. Mollenhoff, who was in the open hearings, which we had gotten opened a considerable effort and expense, and even invoked privilege to answer whether he had ever seen him before—not just conversations.

Mr. WALDIE. All right.

Mr. FITZGERALD. In this they followed the lead of Secretary Seamans, who took refuge first in executive privilege, and then in just plain privilege, to avoid telling what he knew. We were thus denied much information about the White House's knowledge of or involvement in the invasion of my privacy for purposes of character assassination.

However, Clark Mollenhoff furnished valuable evidence from the White House files, and John Dean testified before the Senate Watergate Committee that the White House had "an extensive file" on me. My lawyers' request for the evidence cited by Mr. Dean was ignored.

We made a formal request to the White House for this evidence.

Thanks again to the Senate Watergate hearings, and especially to Senator Inouye, we got a fascinating glimpse of how derogatory gossip is used at the highest levels to destroy a person's reputation. The attached letter is from Alexander P. Butterfield of White House tapes fame to his boss Robert Haldeman. The gossip and attitudes displayed in the letter are self-explanatory. The list of Very Important Persons—then, at least—who received copies of Colonel Butterfield's diatribe demonstrates one way false, derogatory personal information is disseminated.

The list of carbon copy recipients reads like the Who's Who in the White House staff at that time. They included Mr. Ehrlichman, Dr. Kissinger, Mr. Klein, Mr. Colson, Mr. Nofziger, Mr. Magruder, and Mr. Ziegler.

We don't know for sure where Colonel Butterfield got his intelligence. It could have come from OSI, from the Office of the Secretary of Defense—where he had daily contacts, according to the Secretary's assistant at the time—from the FBI with whom OSI has close ties, from the Secret Service, or from his own White House Special Files Unit, or from any of the proliferating dossier warehouses.

Mr. WALDIE. I want to emphasize one phrase in Mr. Butterfield's memorandum to Mr. Haldeman of January 20, 1970, concerning A. Ernest Fitzgerald. In terms of recommendations he said:

We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

Please continue.

Mr. FITZGERALD. Also with reference to that memo, Mr. Chairman, there is an illustration of the way information is distorted, perhaps even made up.

They mention here, as one of my heinous crimes, slipping off alone to a meeting of the National Democratic Coalition. I am not really sure what that is. I have no recollection of the organization. But they then go on to accuse me of planning to "blow the whistle on the Air Force shoddy procurement practices."

Now, this was in May of 1969. In fact, the initial testimony that had so offended my superiors had taken place in November of 1968.

It is astounding to me where they get so much misinformation. But since the subject does not have access to it, he had no opportunity to correct the misinformation until after the damage is done.

The multiplicity of possible sources of false and derogatory personal information and the covert, so-called "confidential" way it is spread around makes it very difficult for a civil servant, or any citizen for that matter, to protect himself from those who misuse or exceed their authority to build false records on a subject.

Mr. WALDIE. I'm sorry. May I interrupt you again?

A memorandum such as Mr. Butterfield's of January 20, 1970, would be placed in your file in the White House? Is that where a memorandum of this nature would be found? Or do you know?

Mr. FITZGERALD. I don't know for sure. As I indicated earlier, Mr. John Dean testified that there was an extensive file on me in the White House. We attempted to get that file because clearly it was evidentiary material in the legal processes we were involved in, but we never even got a response to the request. So we have been unable to find out for sure, Mr. Chairman.

Mr. WALDIE. The reason I ask that is: If we had in the legislation making files and access to files available to public employees, their personal files, I wonder if that would cover a gossipy memo such as this, where he is apparently relating information from some other file, I gather.

Mr. FITZGERALD. I gathered that.

Mr. WALDIE. That Democratic Coalition, National Democratic Coalition information is given in such detail that it was not his own knowledge and must have been relating probably to Cappucci's informants' files, whatever those were.

Mr. FITZGERALD. It could have been anyone.

Mr. WALDIE. You have no idea what that bit of information ever came from, that National Democratic Coalition part which crops up?

Mr. FITZGERALD. No, sir, I do not. As I said, it could have come from any one of the many proliferating agencies who gather such gossip.

As you point out, though, it is quite clear that that isn't something that came to him personally.

I didn't know Colonel Butterfield. He had been a colonel in the Air Force immediately prior to going into the White House. But I did not know him personally—still don't. And so it wasn't from his personal knowledge of me that it came. It had to be through third parties.

Mr. WALDIE. All right; please proceed.

Mr. FITZGERALD. I had mentioned that the confidential way these bits of so-called intelligence are spread around make it very difficult for a civil servant or any other citizen to protect himself from those who misuse or exceed their authority to, first, build a false record on the subject, the victim, and then use the false record to destroy the subject's reputation.

It is probably futile to hope that the Civil Service Commission will be of much help in this regard. It's true the applicable regulations, especially Federal Personnel Manual 732-13 and FPM 736-C-1, appear to provide strong protection against misuse of investigative authority. As interpreted to me by Mr. Robert J. Drummond, Jr., the Director of the Bureau of Personnel Investigations, these regulations are intended to forbid abuses of investigative authority.

However, Civil Service Commission's actual controls in this area, as described to me by Mr. Drummond and by his assistant, Mr.

Walter I. Waldrop, are another matter. According to Mr. Waldrop, it is unlikely that the Commission's appraisers would come across abuses such as my case represents because of their concentration on background investigations. And if they did come across such matters, both Mr. Waldrop and Mr. Travis Mills, Civil Service Commission Assistant General Counsel, say there would be little they could do about it if those abusing their authority were military men.

Now, I am not sure that is correct either, because my interpretation of the regulations leads me to believe that the Civil Service Commission has the power to have any person's salary suspended if they don't follow the legal directives of the Commission in legal matters.

But this is their position, nevertheless.

Mr. WALDIE. Surely they would have a right to do something about evidence of General Cappucci that he destroyed evidence that is favorable—or of any category—on personnel investigation.

If that was his testimony, as you say it was, I am going to send a copy of it to the Civil Service Commission and ask what response they have made. They surely are aware that that was his testimony, that he destroys evidence that his background investigation procures. Are they not aware of that?

Mr. FITZGERALD. The Commission is aware of it. At least the hearing examiner is aware of it, because he made the comments in his written opinion that I quoted earlier.

Mr. WALDIE. You mean—

Mr. FITZGERALD. Saying that it was unconscionable.

Mr. WALDIE. Oh, he did?

Mr. FITZGERALD. Yes, sir. This was his comment, his characterization.

Mr. WALDIE. You mean as to the destruction of the evidence by the General?

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. Well, unconscionable it clearly is, but illegal it seems to me it should be, if it is not. And if it is illegal, I wonder what steps have been taken to prosecute.

Mr. FITZGERALD. I spoke to Mr. Waldrop about this yesterday and several times previously, and he said he was unaware of any abuses ever in this area—never heard of any.

Mr. WALDIE. I think we will get at that transcript. If the transcript shows the General's testimony, it shows that he has destroyed evidence that he has collected. I am quite sure that is illegal and if it is illegal I am going to ascertain why prosecution has not occurred.

Mr. FITZGERALD. Well, General Cappucci has, of course, been promoted. He is now head of the Defense Investigative Service.

Mr. WALDIE. But that does not make him immune from accountability for violation of law if, in fact, a violation of law has occurred here.

Mr. FITZGERALD. No, sir, but I think it is a clear indication that it wasn't regarded as a serious breach by those in charge.

Mr. WALDIE. It has to be that. It has to be the indication.

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. Well, we'll do several things. We'll get hold of that transcript, we'll get hold of the decision, and we'll ask the Civil Service Commission what they have done to prevent similar abuse in the future, if that in fact occurred.

Second, we'll ask the Secretary of Defense or of the Army what actions have been taken against General Cappucci if destruction of evidence has been admitted.

Mr. FITZGERALD. In actuality, Mr. Chairman, the Justice Department, Attorney General Saxbe and Mr. Silbert included, are at this moment defending General Cappucci's action in this regard.

Mr. WALDIE. On this issue of destruction of evidence?

Mr. FITZGERALD. On this specific issue. And my lawyers and I have brought a private action in the matter because we got no response whatever to Senator Proxmire's pleas over a period of years to apprehend the possible felons, as he put it. It was a very outrageous sort of thing to say in the days before Watergate. But now it is so common that nobody pays any attention to it.

But we got absolutely nowhere in attempting to get Justice Department investigations or other corrective actions, and so we brought a private action in the matter, and the Justice Department is, in fact, defending General Cappucci.

Mr. WALDIE. This boggles me. General Cappucci's testimony was under oath, I presume.

Mr. FITZGERALD. Yes, sir.

Mr. WALDIE. And under oath he stated that he did in fact destroy evidence?

Mr. FITZGERALD. Well, he didn't call it evidence. He said he destroyed the field reports. We considered that evidence.

Mr. WALDIE. What did he consider it to be?

Mr. FITZGERALD. He didn't say, as I recall.

Mr. WALDIE. Well, for the record, too, we'll direct a letter to the Attorney General asking if an investigation has been conducted as to whether the laws of the United States were violated by General Cappucci if, in fact, he did destroy these records; if so, what laws; if so, what action has been taken; if none, what action is contemplated; if none, why none?

Please continue.

Mr. FITZGERALD. Mr. Mills, the Civil Service Commission Assistant General Counsel, says that in case of finding abuses the Commission would protest these abuses to civilian officials in the Department of Defense, and would exercise "moral leadership" to protect civilian employees' constitutional, legal, and civil rights.

Now, this situation, capping my own hard-learned lesson, leads me to some broad recommendations for reform which I hope the subcommittee will consider in writing legislation to protect our liberties:

1. Take the military completely out of the business of investigating civilians. As I interpret OSI regulations and FBI agreements in force during my adventures, OSI had no authority for what they did. Civil Service Commission's Mr. Mills said he knew of no specific statutory authority for such acts. On the other hand, none of the experts knew of any operative civilian check on such activities and no effective sanctions for violations. The Civil Service Commission has no jurisdiction, they say, over General Cappucci, because he is a military man. That makes it very convenient.

I personally have serious doubts whether there is presently any effective civilian command, promotion, or discipline authority over the military short of the President himself. This is an unpleasant fact to face, but one that Americans will probably have to live with

for the foreseeable future. Meanwhile, I believe we must protect our freedoms in specific areas such as I have suggested.

2. Make available transcripts of secret congressional hearings after a reasonable time—say 2 weeks—to provide for legitimate security editing.

I have in mind there the secret testimony before Chairman Rivers that was apparently circulated very widely before I had any knowledge of it in any way to protect myself.

3. Require every Government agency to notify annually all individuals on whom dossiers are kept.

This recommendation grows out of the proliferation and the intertwining of these agencies and their work. I think if legislation were written to say that a specific agency had to make known the availability of dossiers, they would simply shift to another agency. So I think the burden has to be placed on all Government agencies to notify those on whom they are keeping dossiers.

4. Require that all dossiers fully identify source and cooperating organizations such as other Government agencies, Dun & Bradstreet, or other so-called credit agencies and contractor corporations.

5. Give individuals access to their dossiers in Government agencies in the absence of a legal showing by the Government that disclosure would violate another person's constitutional rights or personal safety, jeopardize active criminal investigations or similar compelling reasons.

6. Make violation of provisions aimed at protecting privacy a crime punishable by heavy fine and imprisonment.

7. Affirm a private attorney general doctrine to facilitate citizens' initiating prosecutions if the Government does not conduct good-faith policing actions or actively defends accused criminals.

8. Affirm the personal liability of Government officials exceeding their legal authority in invasion of privacy matters. Specifically, forbid use of defenses such as executive privilege, absolute privilege, sovereign immunity, absolute immunity, sovereign prerogative, inherent power, or other royalist doctrines in cases involving a legal showing of probable violation of the privacy protections.

And incidentally, Mr. Chairman, in recent weeks I have gotten down my copy of the Constitution and Declaration of Independence, and I find nothing whatever even remotely resembling these doctrines spelled out in there. All of our historical documents talk to freedom and liberty and equity, and they don't mention these royalist doctrines at all.

Mr. WALDIE. Go ahead with your final recommendation. I have a comment.

Mr. FITZGERALD. I would like to comment that the underlying theme of my recommendations is that the Government cannot be trusted to prosecute itself. The concept of the Government as a criminal, or sheltering groups of criminals, is novel to most Americans. The whole notion is repulsive to us, and most of us would rather not face it. However, it is imperative that we not only face up to it, but also begin to deal with it realistically if we are to keep our ancient liberties.

Thank you.

Mr. WALDIE. Thank you.

Now, looking at Butterfield's memorandum again, that January 20 memorandum to Haldeman, there is an interesting paragraph where he says:

Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

When the Chairman of the Civil Service Commission is appointed by the President and its members are appointed by the President, do you think that loyalty would be less the name of the game for the Civil Service Commission than it would be for Mr. Butterfield or General Cappucci?

Mr. FITZGERALD. I don't think it is any less of a consideration personally, Mr. Chairman, based on my experience with the Civil Service Commission.

It is true that we got a favorable decision, in part, out of the Civil Service Commission, but in retrospect it is also clear that what we did get from them was the very least that they could have given us.

Mr. WALDIE. Also, by the time you got it everybody was recommending in all their little, shabby memos that you be given reinstatement and you had been twisting in the wind long enough, apparently, even for their sadistic desires, and that you ought to be restored.

Mr. FITZGERALD. Yes.

Mr. WALDIE. So I don't think that your Civil Service Commission decision was contrary to administration policy at that point.

Mr. FITZGERALD. I presume it was not, but as I was about to say, what we were given, which was simply reinstatement in a job—not the job I lost or even one comparable to it in responsibilities—no back pay as yet, no legal fees for the long, 4-year fight—all that was denied us. We were given the absolute minimum that would have prevented our going into court, at which point I think we probably could have begun to call on some of the White House documents, witnesses, and so on.

There were two events, in my mind, that won the case for us.

One was Clark Mollenhoff's testimony, his submission in the record of the White House memoranda on the subject, which clearly indicated their involvement.

The second was President Nixon's own statement that he had fired me, had made the decision, in effect saying that he stood by it.

Mr. WALDIE. Yes.

Mr. FITZGERALD. If this was denied the next day by Mr. Ziegler—well, it wasn't denied in actuality. Mr. Ziegler made a statement that was intended to be interpreted as a denial, but he did not in fact deny. He said the President had misspoken, and words to the effect that they could find no record of it. Well, of course there were records of it. He hadn't looked very hard.

But I think the embarrassment of this was another very significant factor in the case.

So I don't think you can depend on the Civil Service Commission to look beyond the loyalty at all.

Mr. WALDIE. I suppose, then, if you can't depend on that—and I think I agree with you—the only key that we can give to assist, if not prevent, but at least assist employees who find themselves confronted with that with which you have been confronted, is the right of access to these files.

But the right of access doesn't mean much if the right to destroy is found to exist on the part of those who control the files, or if the right to destroy doesn't exist but it is exercised and no accountability is demanded from those who exercised it.

I just think the lesson of your ordeal is an important one. But what really disturbs me is how many—not how many; how few. You may be the only one that in fact would have been able to bear the burden of pursuing a relief as long as you have pursued it. There must be literally no one else that has done this to this extent.

Mr. FITZGERALD. I think there are some very good reasons for that. Unless you have a quarter of a million dollars or the equivalent in legal assistance and other help, the assistance of friendly Congressmen, the American Civil Liberties Union, you simply can not take on these powerful agencies—the Government, the whole Government.

It is simply impossible for the typical civil servant who gets in trouble to get the kind of relief that I got.

I have been very discouraged by the amount of time and money it takes. It makes the remedy not available, I think, to most people.

Mr. WALDIE. I'm sure you are aware that your reluctance to appear here today is further evidence of how dampening these attitudes are upon the entire civil service system.

You are not here because of zeal on your part; you are here because we requested you to be here. And I am sure it is not something you want to continue.

And that is a little bit of concern to me. A man who has gone through as much as you have, who has exposed yourself as much as you have, now finds, I am sure, a lot of restraint in the future. You probably would be far less willing to do, under similar circumstances, what you did that brought you to the problems that you have confronted.

I am sure if you had known what you were facing—would you really have testified as you did in terms of cost overruns?

Mr. FITZGERALD. I am not certain that I would, Mr. Chairman. At the time, I must admit, I did not give it adequate thought. I did not foresee accurately the full power and persistence of those who were after me.

There is a statement in my prepared statement that I skipped in the interest of time, a statement by Adm. Hyman Rickover, which I think says it all. Admiral Rickover said many times: "If you must sin, sin against God, not against the bureaucracy. God may forgive you, but the bureaucracy never will."

And I think that is absolutely true.

Mr. WALDIE. The only thing that is untrue about it is that what you did was no sin.

Mr. FITZGERALD. Yes; but committing truth that is embarrassing to your superiors is sinful in their strange way of looking at things.

Mr. WALDIE. Where could we get more information on your files, in your view?

You know, you have obtained some of the documents and I don't know where you have obtained them, and perhaps you don't desire to share that with the committee. And I will ask you, and if you prefer not to, I will accept that.

Where did you obtain the documents that you have been able to present to sustain your case to the Civil Service Commission?

Mr. FITZGERALD. Some of the most important documents came from Mr. Clark Mollenhoff's files, and he knows a great deal about these matters.

John Dean and his assistant, whose name escapes me for the moment—he referred to him and we later looked up his name—know a great deal about it—had custody of these files at the time they were giving testimony.

Clark Mollenhoff has testified that many people in the White House knew a lot more about it, Bryce Harlow, for one. Of course, General Cappucci himself knows a great deal about it.

I obtained the Butterfield memorandum from Senator Inouye.

Mr. WALDIE. Oh; the Butterfield memorandum was from Senator Inouye?

Mr. FITZGERALD. From Senator Inouye; yes, sir.

Mr. WALDIE. Was that part of the Watergate matters?

Mr. FITZGERALD. Yes, sir; it was. And where that came from, I don't know. Perhaps we'll learn when the Watergate business is over.

I presume that Justice has information on it.

The irony of my getting in trouble about congressional testimony is there is already powerful legislation protecting Government witnesses, 18 United States Code 1505, which makes it a serious crime, 5-year jail sentence and heavy fine, to interfere with congressional witnesses or the work of a subcommittee, or to retaliate against witnesses for their testimony. But again it is never enforced by the Justice Department. It just isn't done.

And, of course, this was one of the reasons for grave embarrassment when President Nixon announced that he personally had fired me, an added reason why, I think, officialdom had to scurry around and change the wording.

Mr. WALDIE. Well, we may seek additional information. I am most interested in General Cappucci's actions, and we may ask him to appear before the committee, and perhaps when we get a copy of the transcript we will ask him a few questions.

Mr. FITZGERALD. I have no objection whatsoever to showing you any documents in my possession and telling you where I got them, documents that we are not using in current legal actions.

The only area that I am somewhat uncertain about—and I really have to think about this and perhaps some discussions with the staff would be in order—is how to get at the cooperating organizations, such as Dun & Bradstreet and the military contractors. Because, as I mentioned early in my statement, I first learned of this more or less through a happy accident by one of the—allegedly by one of the security agents at a large West Coast contractor bragging about this. I say allegedly because I have not talked to the man personally.

Mr. WALDIE. Yes.

Mr. FITZGERALD. I talked to very close mutual friends. And this tipped me off and was probably the luckiest thing that happened.

Mr. WALDIE. I think we will probably call General Cappucci. I am interested in who authorized the investigation and when. There seems to be some doubt about that.

Mr. FITZGERALD. Yes.

Mr. WALDIE. I am interested in his treatment of the information he received. And I am interested in how he summarized that information and conveyed it, and to whom; how many people received information as to that file, and whether you ever received any information.

May I ask you this: Did you ever request access to General Capucci's files?

Mr. FITZGERALD. Yes, sir; repeatedly.

Mr. WALDIE. And you were never provided that access?

Mr. FITZGERALD. Only to the extent I have indicated in my statement, the bowlderized, summarized, partial disclosures.

Mr. WALDIE. All right.

I have no further questions, Mr. Fitzgerald, and I appreciate your appearance before the committee.

Mr. FITZGERALD. Thank you, Mr. Chairman.

[The Butterfield letter referred to follows:]

THE WHITE HOUSE,

Washington, D.C., January 20, 1970.

ADMINISTRATIVELY CONFIDENTIAL

Re A. Ernest Fitzgerald.

Memorandum for: Mr. Haldeman.

From: Alexander P. Butterfield.

I may be "beating a dead horse" at this late date . . . but it was only a few days ago that Alan Woods called to ask if we had arrived at any particular Administration line regarding Mr. A. E. Fitzgerald. And someone else (I can't remember who) asked the same question at about the same time.

You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again—partly for the record—and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.

Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's "shoddy purchasing practices". Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military Services are, they very definitely do not go out of their way to waste government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and interospective—so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.

Upon leaving the Pentagon—on his last official day—he announced to the press that "contrary to recent newspaper reports" he was not going to work for the Federal Government, but instead, was going to "work on the outside" as a private consultant.

We should let him bleed, for a while at least. Any rush to pick him up and put him back of the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

We owe "first choice on Fitzgerald" to Proxmire and others who tried so hard to make him a hero.

cc: Mr. Ehrlichman, Dr. Kissinger, Mr. Klein, Mr. Colson, Mr. Nofziger, Mr. Magruder, and Mr. Ziegler.

Mr. WALDIE. The next witness will be Mr. George Tilton, Associate General Counsel of the National Federation of Federal Employees.

Mr. Tilton.

STATEMENT OF GEORGE TILTON, ASSOCIATE GENERAL COUNSEL,
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. TILTON. Mr. Chairman, I appreciate the opportunity of appearing before you today. Mr. Michael Forsey was scheduled to appear and he was unable to make it.

Mr. WALDIE. All right. You may proceed.

Mr. TILTON. Mr. Chairman, I have listened to Mr. Fitzgerald's testimony and I am appalled by what he has told the subcommittee today. The question of destruction of evidence is amazing. It appears to me that at least in the criminal section of the law there are adequate safeguards against such activities. I have not practiced criminal law for some time, but it is my recollection that in the criminal area, if the Government is guilty of withholding or destroying evidence, a Federal judge at least would throw the case out of court.

And it appears to me that perhaps in instances like this, the appropriate response for the Congress to take might be to provide an exclusionary rule; that is, if the Government destroys evidence or withholds evidence, they can use no other evidence that they have gathered against the employee in any action.

I have not given consideration to this possibility. If the Chairman so desires, I will be prepared to come forward with some proposal.

Mr. WALDIE. I would be very interested in that. That is an excellent suggestion.

You don't think that principle of law would apply to administrative law?

Mr. TILTON. No, Mr. Chairman, I do not think it does, because my recollection is that it is a judge-made rule, rather than a rule made by the Congress.

Mr. WALDIE. I see. That is an excellent suggestion, and I would appreciate a further memo from you on that.

Mr. TILTON. Very well, Mr. Chairman. I will do it as quickly as possible.

Mr. WALDIE. There's not that big a rush on it. Staff will let you know what the time frame is, and there is plenty of time.

Mr. TILTON. Mr. Chairman, the purpose of the bills before us today is to prevent the indiscriminate interference by the executive branch in the lives of its employees. Among other things, the bill would make it illegal to coerce an employee to buy bonds or make charitable contributions, attend meetings or lectures unless related to employment. It prohibits officials from requiring the disclosure of personal assets or liabilities, or those of any member of his family unless, in the case of specified employees, such items would tend to show a conflict of interest.

It would provide a right to have counsel present, if the employee wishes, at any interview or interrogation which may lead to a disciplinary proceeding.

Most importantly, it would give the employee a right to a civil action in Federal Court for violation or threatened violation of the act, and would establish a Board of Employee Rights to receive information and conduct hearings on complaints of violation of the act, and to determine and administer remedies and penalties.

Again, Mr. Chairman, I think we might have an analogy to the criminal law in this instance. In criminal law the police are required to advise a suspect when he in fact becomes a suspect of his right to have an attorney present. It appears to me that if an employee is suspected of something and is actually under investigation, if the agency were required to notify the person that he is under suspicion at that time, this would prevent many of the difficulties that we have seen; perhaps

would have prevented the Fitzgerald affair also, had he been forewarned of the investigation.

I will not today address myself to specific prohibitions in the legislation. The need for each of them has been well documented in hearings before the Senate Subcommittee on Constitutional Rights in years past. In fact, the bill that passed the Senate this year is almost identical to those passed by the Senate in preceding sessions going as far back as 6 years. Passage is long overdue.

The question to which the subcommittee must address itself is whether the bill goes far enough, that is, whether in the intervening years since the introduction of the original bill, sufficient evidence of further encroachments on the right of privacy of Federal employees has been documented to warrant an expansion of its provisions.

We will indicate specific areas which, we believe, merit the attention of the subcommittee. However, we also want to make it clear that even if the bill is not strengthened, it should be passed. We say this because first, regardless of any shortcomings, the bill would establish a statutory basis for the preservation of specific rights and liberties of Government employees which could then be expanded by future amendment, if necessary.

More importantly, new remedies are established in sections 4 and 5 of S. 1688 which would, at long last, give the aggrieved employee a choice of independent forums before which to take his grievances. The Board of Employee Rights would have the power to discipline officials who violate the provisions of the act; its members would be prohibited from holding any other Government post, thus assuring their independence—a quality sadly lacking under the present system. Section 4 gives any aggrieved employee the right to institute a civil action in Federal district court without having to exhaust his administrative remedies.

Both provisions are critically important. Justifiably or not—and I believe it is justifiable—Federal employees do not believe that they receive impartial treatment under present administrative procedures.

First, the reviewing officials are not perceived to be impartial or independent.

Second, the procedures are so cumbersome, the time needed to exhaust administrative remedies so long, and correspondingly the possibility of being singled out as a "troublemaker" so enhanced, that many meritorious claims are never pursued.

In this connection we have heard Mr. Fitzgerald say you need a quarter of a million dollars. There are not many employees that have that type of resources or the access to the media that Mr. Fitzgerald had.

However, armed with the remedies provided in this legislation, potential offenders will be on notice that they can no longer expect grievances to be lost in a procedural morass.

I would predict that with these two remedies we will see a dramatic change in the present situation.

For these reasons alone, we believe the bill must be enacted as is, if necessary. This may be our last chance. We fear that if the bill is not enacted this year, the present political atmosphere, so conducive to the protection of the right of privacy, will dissipate, not to reemerge for some time.

I would now like to turn to a discussion of some specific areas of the bill which should be strengthened, and ignored areas which require attention.

First, I call your attention to section 1(R). It presently provides that no interrogation of an employee for misconduct which may result in disciplinary action may be conducted without the presence of counsel or other personal representative, if the employee so requests. Our concern is that this provision can be circumvented by enterprising investigators.

For example, suppose an investigation is being conducted into the disappearance of Government property which, it is suggested, has been stolen by employees of the Government. We have received reports, for example, that it is the policy of the General Services Administration to provide an employee the right to counsel during interrogation only if he is, at that time, the subject of the investigation.

Thus it would be possible, by simply declaring the person is not the subject of an investigation, to circumvent that purpose. However, information garnered from the interview, when combined with information derived from interrogation of other nonsuspect employees, may become the basis for charging an employee with the offense.

Again, Mr. Chairman, I believe the *Miranda* type of warning when the Government suspects an employee of misconduct would solve this problem.

We believe the language of section 1(R) should be interpreted in such a way as to obviate this problem. But it may not be. Therefore, we suggest that the section be amended to provide that an employee must be given the opportunity to be represented by counsel or other personal representative during any interview which relates to an investigation of misconduct, whether the interviewee is the subject of the investigation or not.

Section 1(d) of S. 1688 makes it unlawful for an officer of any executive department or agency to require or request an employee to report on any of his outside activities unless they are related to the performance of his official duties. We believe that a vital corollary to this admonition is that no agency should be permitted to take disciplinary action against an employee for any of his outside activity unless it directly relates to and reflects upon the performance of his official duties.

A good example involves the case of Mr. Joseph Gibson.

On April 21, 1972, Mr. Donald Leist, manager of the General Services Administration Building in Louisville, Ky., received a letter from the Liberty Loan & Investment Corp., a Louisville firm, concerning the alleged debt of Mr. Joseph Gibson, a GSA employee. At that time the debt was 4 years past maturity. It had not been reduced to judgment.

On June 21, 1972, Mr. Gibson was issued a letter of warning from Mr. Leist for failure to pay just debts. On September 18, 1972, Mr. Gibson received a letter from Mr. J. E. Smith, regional director of the Public Buildings Service which read in part:

On June 21, 1972, you were issued a warning letter for failure to pay your just debts. Since this is your second offense of this nature, you are hereby officially reprimanded. You are further cautioned to make arrangements to pay this debt as soon as possible. Failure to pay those debts for which you are legally obligated will result in more severe disciplinary action.

On April 27, 1973, Mr. Gibson received a letter of proposed removal from the Federal service for use of abusive language to a supervisor. However, that charge alone would not have been sufficient grounds for removal, so previous infractions were cited as justifications for removal. One of these infractions was the letter of reprimand for failure to pay just debts. Mr. Gibson is at present appealing his removal.

In this connection I would note that Federal employees' salaries are not generally subject to garnishment by any outside person. However, it seems to me if an agency can compel a person to pay a debt which may or may not be just, the intent of the law to preserve the salary is being circumvented by the agencies. I think this is an unconscionable way to circumvent the Federal law.

Another case involves Mrs. Doroth Kravitz.

In September of 1972, Mrs. Doroth Kravitz, a GS-5 computer operator at the National Aviation Facilities Experimental Center in Atlantic City, N.J., an installation run by the Federal Aviation Administration, was arrested for causing a disturbance in a police station. Mrs. Kravitz had become abusive to an officer when he would not permit her to see her son who had been arrested for disorderly conduct earlier that evening.

Mrs. Kravitz was subsequently convicted of disorderly conduct and fined \$25. When the Security Division at the facility learned of the incident, they informed the Executive Director, who ordered Mrs. Kravitz' supervisor to issue her a letter of reprimand. The letter of reprimand stated that Mrs. Kravitz' conduct "reflected unfavorably on the Federal service."

FAA Regulation 3750.4, section 2(51) states:

The FAA expects employees to conduct themselves while off duty in a manner which will not reflect unfavorably on the U.S. Government, the FAA, or FAA employees as a group.

This regulation is not unique. I believe every agency has a similar regulation.

We believe the bill under consideration provides an opportunity to erase this evasive standard from the Federal Manual. Its defects are obvious. It places total discretion in the hands of management officials; it is applied to lower grade employees whose outside activities do not remotely reflect on the performance of their duties; and it can be applied by anyone in authority by any standard which he wishes to assert.

By serving the Government, a person does not necessarily surrender all spheres of his personal life. The distinction between what he does privately and the satisfactory performance of his duties as a public servant remain distinct. To equate an individual's performance with his employment is absurd. There should be a relationship between his personal conduct and the effect of that conduct on the agency.

Accordingly, we would make the following recommendations:

1. Failure to pay debts should be specifically excluded as a ground for disciplinary action. Creditors have sufficient legal remedies through the courts to reduce their claims to judgment.

2. While there may be instances when an employee's conduct off the job may impair the Government's ability to inspire trust on the part of the citizenry, these instances can be narrowly limited.

First, conviction of a serious crime may be grounds for removal.

Second, other conduct which may reflect adversely must relate specifically to the employee's duties, and his position must be one which requires that he be above reproach in his personal life.

Thus, the arrest of a truck driver for disorderly conduct should not be grounds for disciplinary action. However, the conviction of a disbursing officer for larceny could reasonably be grounds for such action.

Finally, Mr. Chairman, I would like to speak to the issue of the employee's access to his personnel files. The legislation before us today does not provide for such access. We think such a provision should be added. It should specify that an employee has the right to examine and challenge information in any files maintained on him by the employing agency. Further, the agency should be prohibited from maintaining any secret files on an employee, and dissemination of any such information should be made illegal, and subject to the enforcement provisions of the bill.

The committee has previously heard testimony about the dangers to privacy inherent in the computerization of records. This increasing computerization of records makes access to files all the more critical.

Mr. Chairman, neither our testimony nor the provisions of the bill before us exhausts the areas of inquiry regarding Federal employees' privacy which could and should be pursued.

A few days ago the Supreme Court issued a decision in the *Kennedy* case. The facts of the case were quite simple. Kennedy was a Federal employee in Chicago who was removed from his position for exercising his first amendment rights.

Mr. WALDIE. What were those rights? I am interested in that case. What did Kennedy do under the first amendment?

Mr. TILTON. Well, frankly, Mr. Chairman, he may have been removed under any circumstances. He accused the head of the Agency of taking bribes, as I recall the facts. In point of fact, I think it was later proved that the head of the Agency was not guilty of this.

And it may be said that perhaps this did, in fact, reflect on the Agency and was not good for the Agency.

Mr. WALDIE. Well, that really isn't the protection of speech, to accuse a person of a crime falsely.

Mr. TILTON. Yes; or at least it could have been interpreted as a slanderous statement.

The importance of the case, however, goes beyond the facts of the case.

Mr. WALDIE. Yes; I understand.

Mr. TILTON. The Supreme Court held it was permissible to remove him without a prior hearing, that the standard for the efficiency of the Government was not unduly vague.

Now, it is quite possible that Kennedy's removal was justifiable under the circumstances. However, the danger of the case is that the Federal agencies will now interpret the *Kennedy* decision as authority to impose a gag rule on Federal employees.

Mr. WALDIE. But if the *Kennedy* decision is construed in the narrowest of terms—and I concur in your assessment of the dangers. But if, in fact, the employee did accuse the head of the agency of criminal conduct and, in fact, the criminal conduct had not occurred, that surely is grounds for dismissal; is it not?

Mr. TILTON. I believe that would be grounds for dismissal, and I believe justifiably so.

Mr. WALDIE. But your understanding of the case is that it extends the grounds much beyond what Kennedy did?

Mr. TILTON. Yes; I believe that it does. And we have already seen evidence, at least, that employees so interpret it.

In recent days we have received calls from people that we know and respect, who have specifically mentioned the *Kennedy* case as grounds for not giving us any information.

Mr. WALDIE. Do you believe that if an employee were to stand up and say that the Nixon's administration's policies relative to contracting out are abhorrent, that would be sufficient to discharge him under the *Kennedy* case?

Mr. TILTON. I think that it could possibly be interpreted as such by an agency. I do not think that it should be.

However, the point is, Mr. Chairman, let us assume that the employee would eventually be vindicated—and I think under the circumstances you have suggested he would be vindicated. But meanwhile he will have been removed from his job, and much as Mr. Fitzgerald, possibilities are he will never be reinstated because he will not have \$250,000 to do it.

Mr. WALDIE. Tell me where the *Kennedy* case broadens the existing right of an agency to fire an employee.

Mr. TILTON. Well, whether it broadens it or not, I think the critical thing is how it will be interpreted.

We believe we have some indication that it will be interpreted as allowing the agency to impose a gag rule on individual employees—certainly employees do.

But what it does do is confirm that an agency may remove an employee prior to having a hearing conducted on the merits of the case.

Mr. WALDIE. I think that is the most objectionable part of it.

Mr. TILTON. I believe it is, also.

Mr. WALDIE. I can't see that in any way it expands the authority now to dismiss. It seems to me that authority is almost total, for the good of the service, and for the efficiency of the service, and such ill-defined standards.

Mr. TILTON. I agree with you, Mr. Chairman, that it does not expand that, but it does confirm it, and I think it will be interpreted in such a way that employees will be frightened.

As I said, we have indications of this already.

Mr. WALDIE. Prior to the *Kennedy* case, a hearing must be held; is that correct?

Mr. TILTON. No, that is not correct.

Mr. WALDIE. Has the *Kennedy* case broadened the power of the employer in that field?

Mr. TILTON. The *Kennedy* case has confirmed that an agency need not give an employee a hearing before discharge if it does not wish to. It is a discretionary matter.

Mr. WALDIE. Was that in doubt before the *Kennedy* case?

Mr. TILTON. Well, we have always felt that there was some question. The law, as we understand it, is not specific on it. It was more of a discretionary matter.

Mr. WALDIE. Well, it still is.

Mr. TILTON. Conceivably they could still give a hearing before removal. The possibilities are that they would not.

I can think of few—in fact, I can't think of any case offhand where an agency has ever given a hearing before removal. Usually there will be removal and then a hearing afterward.

I don't have any personal problems with the standard employed by the Supreme Court for the efficiency of the Government. What I do have a problem with is who applies it. What happens is that the agency is both the judge and the jury. This, I think, is the true evil that must be addressed.

Mr. WALDIE. Do you think that the law should be that in every instance of removal the employee should be given a hearing?

Mr. TILTON. There should be some instances where a summary removal might be justified.

Mr. WALDIE. But those instances, I gather, are rare.

Mr. TILTON. I think they are quite rare.

Mr. WALDIE. I understand what you mean in that respect. It should be the exception, not the rule.

Mr. TILTON. I think it should be the exception, because I think Mr. Fitzgerald's case is the most graphic illustration we can find. He spent \$250,000 to get back his job.

Mr. WALDIE. But the sad thing is that had they given Mr. Fitzgerald a hearing, the result would have been exactly the same.

Mr. TILTON. Except for one thing, Mr. Chairman. We would not now be worried about backpay for Mr. Fitzgerald.

Mr. WALDIE. Why?

Mr. TILTON. He would have been in the job at the time.

Mr. WALDIE. No, had they given him a hearing immediately and discharged him, wouldn't he be exactly where he is, and would not that have been the inevitable result of the hearing?

Mr. TILTON. If we presume the hearing results would have been the same before as after, which they may well have been.

Mr. WALDIE. Yes.

Mr. TILTON. In any case, we do have specific proposals on this particular area.

It seems that the burden of proof required to remove an employee ought to be changed. We feel that it ought to be clear and convincing proof that is required before an employee can be removed.

We suggest that there should be a hearing before removal. We think it ought to be one of three different types of hearings:

One—and in my opinion, the least desirable—would be a hearing conducted by the Civil Service Commission.

Two, it could be a hearing where the employees are represented by an exclusive bargaining agent.

Third, it could be a hearing conducted by an arbitrator, if desired. The arbitrator's ruling could be appealed to the Federal courts.

Fourth, where there is a possible unfair labor practice associated with the removal, it could be a hearing conducted by an administrative law judge. Again there could be a further appeal to the Federal courts, if necessary.

We feel that the standard is sufficient provided that the employee is given due process. We think the Kennedy decision does not give the employees sufficient due process.

For all practical purposes, if you removed—unless he has great resources and friends, he's out.

I recall the Chairman of the Civil Service Commission stating that some 20,000 people were removed every year from the Federal service, and I don't know how many are reinstated, but I would be willing to hazard a guess that it's a very small number.

Mr. WALDIE. In the Fitzgerald case, the references to T-1, T-2, T-3, and T-4—I gather that was not gossip per se. Those were identifiable witnesses that were identified only to the security people, and the identification not available to others examining them.

Mr. TILTON. Well, Mr. Chairman, I would not say that it was not gossip.

Mr. WALDIE. Oh, it may well be gossip, but the witnesses' names were known, I presume, to the investigators.

Mr. TILTON. I'm certain they were known to whoever conducted the investigation.

Mr. WALDIE. Whether or not it's gossip is a question that is present even if they are Mr. Jones and Mr. Smith and Mr. Brown.

Mr. TILTON. Sure.

Mr. WALDIE. And there is no way that that can—or maybe there is no way in which that could be prevented. In raw intelligence gathering, I presume there is a lot of gossip.

Mr. TILTON. I think that is probably a fair statement.

Mr. WALDIE. The evaluation of the gossip is up to the intelligence analyst.

Mr. TILTON. Yes.

Mr. WALDIE. But at least the person who is the subject of the gossip ought to have access to that gossip.

Mr. TILTON. I believe there should be total access.

Again, I believe the analogy to the criminal sphere is relevant.

It is my understanding, my recollection, that when a criminal case is being conducted, if the Government has any information at all, they must turn it over to the defense before they can proceed; otherwise they can't use it. That is my recollection of the system.

Mr. WALDIE. Yes.

OK, I have no further questions, Mr. Tilton.

Mr. TILTON. Mr. Chairman, I would like to close with a quotation.

Mr. WALDIE. Surely.

Mr. TILTON. It is by a former Attorney General of the United States in 1971, dealing with wiretapping and invasion of privacy.

The Attorney General said:

Self-discipline on the part of the executive branch will provide an answer to virtually all legitimate complaints against excessive governmental information-gathering.

Well, we didn't believe it then, and we certainly don't believe it now. I think Mr. Fitzgerald's case is adequate proof that the executive branch is not going to exercise self-discipline. I think we need a bill, and I think this bill will go a long way toward preventing future abuses.

Regarding the Kennedy situation, again I am prepared to suggest proposals that would correct the situation, if the chairman so desires.

Mr. WALDIE. I would appreciate that very much. I would really like to have your analysis of the Kennedy case, as to what it does—what

changes it makes in existing practices, and what threats it poses for the future in view of those changes, and what remedies you propose.

Mr. TILTON. Thank you, Mr. Chairman. I'll do that at the first opportunity.

Mr. WALDIE. Thank you. We appreciate that.

Our next witness was to be Mr. Clyde Webber, president of the American Federation of Government Employees. Mr. Webber will be unable to testify today because of the death of Mr. John Griner, a personal friend and longtime advocate of employee rights and benefits and privileges, and president-emeritus of the American Federation of Government Employees.

Mr. Griner served as the leader of that group between 1962 and 1972 and did a great deal to gain greater benefits for Federal employees, and he will long be remembered by those of us who have been engaged in this field.

But the prepared statement of the AFGE will be included.

(The prepared statement of the American Federation of Government Employees is as follows:)

STATEMENT OF CLYDE M. WEBBER, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

On behalf of the American Federation of Government Employees, representing over 650,000 Federal employees in exclusive recognition units, I wish to express gratitude to this Subcommittee and to its distinguished chairman, Congressman Waldie, for scheduling hearings on the important subject of the Constitutional rights to privacy of Federal employees.

To speak of the Constitutional right to privacy is almost to speak redundantly. The most fundamental philosophy behind our Constitutional system of checks and balances is the intent to protect the sovereign privacy of the individual citizen's person from the encroachment of public institutional power. The articulated separation of the public powers of our constitutional system, into separate, but co-equal legislative, judicial and executive branches, was not to set them at odds with each other but solely to institutionalize a system of checks and balances to protect the liberty and, thereby, the sovereignty of the individual human being.

Until the first quarter of this century for most Americans, the right to privacy was taken for granted. However, the vast increases in scientific and technological knowledge, the demand for governmental services and the growth of governmental power, the traumatic impact of our system of laws correcting massive social injustices, such as discrimination, through the process of checks and balances, has abrasively brought the citizen into sharp contact with institutional authority that has ruptured his self-contained sphere of individual privacy.

For the civilian employees of the Federal government, who are employed to carry out public duties under law, this contact with public authority has been constant, direct, and in large measure has resulted in an erosion or a denial of their rights to privacy which far exceed that visited upon our population as a whole.

The relationship between these American citizens and their government is two-fold, first as sovereign citizens but also as official subordinates. It is this dual relationship which has led to the invasions of the right of privacy with which we are dealing in considering the two Bills before you, S. 1688 introduced by Senator Ervin and H.R. 1281 introduced by Representative Wilson. These Bills are of signal importance, not only to Federal employees, but as a symbol of Congressional concern for the most precious of all rights of a free people in a technological age, the right to be left alone.

To understand the issues, involved in the Bills before us, we need to distinguish, therefore, the two very different kinds of rights which are possessed by American citizens who are Federal employees.

The first, are their Constitutional rights, which belong to them purely and simply because they are American citizens living under the American Constitu-

tion. The second are their rights as Federal employees, which they acquire only if and when they accept Federal employment. These so-called "employee rights," are correlative and conditional rights, intermingled and associated with reciprocal employee duties, obligations, and responsibilities.

Unless one bears these distinctions in mind, much misunderstanding can arise in the consideration of these Bills.

The two Bills, in the first place, do not establish or grant any additional rights to Federal employees. They already possess all these rights simply by being American citizens. What the Bills do, however, is to provide by statute both standards and procedures under which American citizens who are Federal employees can "preserve" and "enjoy" those Constitutional rights which they already possess.

Both Bills are in fact silent on those "rights" which are, strictly speaking, "employee rights." The Bills do not seek to interfere per se with any existing laws, regulations, labor-management agreements under Executive Order 11491, grievance or appeals procedures or any other activity which relates to "employee rights" as such. Beyond the scope of the Constitutional rights sought to be preserved, therefore, they quite properly, do not take away from the Civil Service Commission any functions which it has exercised in the past in protecting "employee rights" and enforcing "employee obligations."

A DILEMMA

Nevertheless, the two Bills do create a dilemma. While it is true that theoretically the two Bills seek to solve the problems of safeguarding the specifically denominated Constitutional rights to privacy, they overlook other kinds of invasions by defining the "invasion of privacy" in far too restrictive terms.

Perhaps the most cruel invasion of privacy takes place in the area where the managers invoke both "executive privilege" and "medical privilege." When management wants to remove an employee under these conditions of dual "privilege," they are able to pierce his most personal spheres of privacy, that pertaining to the condition of his mind and body, by directing medical or psychiatric examinations. This procedure is often a camouflage for the real reason to discharge an employee. Then management, claiming to deny access to a man to his own personal records, on the alleged humanitarian grounds they don't want him to be frightened by discovering how sick he really is, prevents any meaningful inquiry into the merits of the case. On the one hand, they tell a man he is physically and psychologically incompetent to work; on the other hand, they say he can't be shown the record because showing it to him would make it difficult for him to recover, or be injurious to his health. The trauma of being discharged and its effect on an employee's health is somehow overlooked.

These two Bills would be improved, in our opinion, if they were amended to require that all Federal employees, who are obliged to submit to the invasion of the privacy of their own bodies and minds through compulsory medical examinations, be entitled to receive copies of their medical records on request. Further, that, whenever a Federal agency proceeds to place an employee on medical retirement, or to dismiss him, the agency must provide the employee, or his designated representative, a full transcript of the entire medical record used as the basis for medical retirement or dismissal.

There are other intrusions, especially of a political nature, into the private life of Federal employees which are not covered, for example, by the Hatch Act but which are invasions of privacy. One of these is the "political clearance" usually at White House level but frequently within the highest levels of the agencies of career or "non-political" appointees. Because of the peculiar formulations of the Hatch Act, certain officials are now immune from accountability for invading the area of the political activities and opinions of Federal employees. These two Bills do not take adequate notice of political abuses of privacy not covered by the Hatch Act.

A SECOND DILEMMA

A second dilemma of these Bills arises precisely from the circumstance that they delineate so clearly and explicitly the denominated Constitutional rights of Federal employees without taking into account the inter-relationship of these Constitutional rights to the "rights" Federal employees have under statutes such as the Lloyd-Lafollette Act, the Veterans Preference Act, and a multitude of other legislation including the right to equal employment opportunities with-

out regard to race, religion, sex, or age. Although many of these are implicit in our Constitution, although many have been upheld by the courts, nevertheless, the procedural and statutory mechanisms to vindicate and administer these rights are not equally adequate.

Consequently, it would appear that these Bills, while establishing a Board of Employees Rights, might be omitting from its jurisdiction categories of cases and classes of rights which could be defined as, or equated with, invasions of privacy but which are covered by other statutes relating to equal employment opportunities, forbidden political activities, or adverse actions which are less explicit in setting up safeguards and standards.

Under these circumstances, we could envisage numerous situations where there might be issues of jurisdiction raised by one or other party which could not be resolved between the Board of Employees Rights and the Civil Service Commission, which generally has statutory jurisdiction and exercises quasi-judicial authority over other types of issues involving both employee and individual Constitutional rights. This could create serious problems of conflict between them, where the Board and the Commission might consider each other as rivals, or the Commission would come to regard the Board as an adversary of the Commission rather than a protector of Federal employees, or vice versa.

A final problem is the charge that this legislation would further proliferate the Federal agencies dealing with the administration of Federal personnel and the adjudication of employee rights, thus increasing costs to the taxpayers and requiring resort to numerous authorities before an employee's rights may be fully vindicated.

A POSSIBLE SOLUTION TO THESE DILEMMAS

While we have testified in the past in favor of an independent three-member "Board of Employees Rights" appointed by the President with the advice and consent of the Senate, there is some credibility to the Civil Service Commission's allegations that this could lead to a further proliferation and thus impede, rather than enhance, the administration of due process and the protection of "privacy" within the Executive Branch.

The Civil Service Commission is already required by statute to perform adjudicatory functions in such matters as adverse actions, equal employment opportunity cases, performance ratings and the rights of veterans preference eligibles. Unfortunately, these procedures as administered have not led to a system of adjudication which is regarded by employees as just or objective. We believe this results mainly from the institutional structure of the Commission, and not from evil intent or incompetence of the staff or Commissioners.

A goodly part of the problems of the Civil Service Commission derive from the fact that its authority has been eroded or usurped by the Office of Management and Budget and by the Inter-Agency Groups. In this situation, Department and Agency Heads have been able to ignore or evade the mandates of the statutes administered by the Civil Service Commission. A recent example is the illegal use of political party clearances in selecting employees at the General Services Administration and the Department of Housing and Urban Development.

Rather than proliferating and dissipating the supervisory powers available to the Federal Executive Branch to uphold the Constitutional and statutory rights of Federal employees it would, in our view, be better to strengthen the Civil Service Commission's present structure to enable it both to reassert its proper original role as the guardian of the merit system and to generate meaningful quasi-judicial decisions in all cases where the Constitutional and statutory rights of employees are involved.

To this end, we should like to suggest that the 3-member "Board of Employees Rights," proposed in these Bills be made a coequal constituent part of the Civil Service Commission. This could be done by adding two more Commissioners, with judicial backgrounds, chosen on a nonpartisan basis, who would be nominated by the President and confirmed by the Senate. Their sole functions would be, acting with the chairman of the Civil Service Commission as a 3-member body, to administer all the quasi-judicial responsibilities now entrusted to the Commission as well as those related to protection of "privacy" provided in these Bills.

Under this proposal, the enlarged five-member Civil Service Commission would have two types of functions discharged by two separate groups of equal rank and prestige each composed of 3-members, with each group sharing the Chairman as a member.

The first coequal 3-member group would have two judicial members who are confirmed by the Senate after hearings before the Senate Judiciary Committee, and who, together with the chairman, would deal exclusively with quasi-judicial matters. In effect, they would constitute the top administrative court for all Federal personnel matters. This group would supplant the existing constituent bodies dealing with adverse actions (Board of Appeals and Review) and with grievances (Equal Employment Opportunity), the Hatch Act, as well as being the top appellate administrative body. One of its main functions would be to systematize administrative law on the basis of precedents which would govern its decisions. It could function through a system of regional administrative law judges. Its decisions would be binding upon the Commission and upon the Departments and Agencies.

The other co-equal body, which would be "political" rather than "judicial," would be composed of the Chairman plus two members, all nominated by the President and all approved by the Senate Committee on the Post Office and Civil Service—in short, the present Commissioners. Unlike the first three-member body, two of whom would have juridical background and be chosen on a nonpartisan basis, the Chairman and the two Commissioners would be chosen as at present on a bipartisan basis with the Chairman and one member being of the same party as the President and the third member belonging to the other party.

The function of these three commissioners would be primarily to develop new legislation, to approve all rules and regulations, to conduct personnel inspections of the agencies, to participate in inspection "closeout" reports to agency heads, and to render conclusive judgments in classification appeals. The Chief Inspector of the Civil Service Commission would report to the three Commissioners. The three administrative commissioners would also be the top body to hear general classification appeals affecting classes of employees, excepting only cases involving charges falling directly under the jurisdiction of the three juridical commissioners.

THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION

The Chairman of the Civil Service Commission would participate as a voting member in both the three-member juridical commission and the three-member administrative-legislative commission. However, in neither case could he veto the actions of the other two members, if they voted together. Thus, he would provide the personal and official link between the normal administrative functions of the Commission and its expanded quasi-judicial functions, without undermining either of these co-equal roles. In short, the quasi-judicial functions of the Commission would be exercised independently of its top executive policy-making responsibilities. Moreover, apart from these quasi-judicial and quasi-political-legislative functions as a member of the two tripartite bodies, the Chairman would continue to be the chief executive officer of the Commission, assisted by the Executive Director.

In this way, it might be possible to achieve all the purposes of these fine Bills, establishing a top-level appellate quasi-judicial body independent of political considerations yet linked to the day-to-day operations of the rest of the Civil Service Commission through the person of the Chairman. We believe that such a structure would not only insure both the substance, as well as the appearance of justice and objectivity in adjudicating employee rights, but would facilitate the incorporation of such decisions with the day-to-day administration of the personnel system.

THE NEW FIVE-MEMBER CIVIL SERVICE COMMISSION

To recapitulate, the new five-member Civil Service Commission would be composed as follows:

A. *Juridical Commission*.—Chairman, plus two nonpartisan juridical commissioners having ultimate administrative and appellate jurisdiction over the following:

1. Existing Board of Appeals and Review—Adverse Action Cases.
2. Medical Retirements (New).
3. Existing Appeals Examining Office.
4. Existing Office of Hearing Examiners—Solely for administrative purposes—no appeals involved.
5. Existing Equal Employment Appeals.
6. Regional Administrative Judges (New).

7. Office of Protection of Constitutional Rights (New).
8. Adjudications of alleged Hatch Act violations (Existing).

B. *Executive Commission*.—Chairman, plus two bipartisan Administrative Commissioners:

1. Legislative Proposals, Rules, Regulations.
2. Administration of Civil Service Act, Presidential Rules, and regulatory aspects of Lloyd-Lafollette and Veterans Preference Act.
3. Classification Appeals.
4. Inspections of Agencies for Compliance with Policies—Bureau of Personnel Management Evaluation.
5. General Counsel.
6. Federal Executive Institute.
7. International Organization Employees Loyalty Board.

C. *The Chairman and his Executive Director*.—As today, the Chairman of the Civil Service Commission would be the Chief Executive Officer, assisted by the Executive Director responsible primarily to him. The Chairman and his Executive Director would control all the normal administration of the Commission, including the following:

1. Office of Labor-Management Relations.
2. Office of Incentive Systems.
3. Office of Public Affairs.
4. Interagency Advisory Group.
5. Bureau of Policies and Standards.
6. Bureau of Recruiting and Examining.
7. Bureau of Executive Manpower.
8. Bureau of Personnel Investigations.
9. Bureau of Management Services.
10. Bureau of Training.
11. Bureau of Retirement, Insurance and Occupational Health.
12. Bureau of Manpower Information Systems.
13. Bureau of Intergovernmental Personnel Programs.
14. Regional Offices (10).

SUMMARY AND CONCLUSION

To summarize, our union endorses the provisions of S. 1688 and H.R. 1281, but recommends that the Board of Employees' Rights be made a coequal constituent part of the Civil Service Commission, which would be enlarged to five members. The resulting three-member "juridical commission" would deal with all quasi-judicial matters now under the Civil Service Commission plus those standards and procedures incorporated in the Bills. The three-member "executive commission" would acquire greater strengths in personnel inspections and would also devote itself to proposals for legislation. The Chairman of the Civil Service Commission, moreover, would continue to be the chief executive of the Commission, assisted by the Executive Director and the offices and bureaus already established in the Commission. In this way, the Civil Service Commission would be reformed and strengthened to rationally discharge those divergent functions entrusted to it without the internal conflicts of interest.

We submit these views with the most fervent hope that they may be helpful to you in enacting legislation this year to protect the Constitutional rights of Federal employees. We express once more our gratitude to your Subcommittee for the opportunity to testify.

Mr. WALDIE. Our final witness will be Mr. John McCart, operations director of the Government Employees Council of the AFL-CIO.
Mr. McCart.

STATEMENT OF JOHN MCCART, OPERATIONS DIRECTOR, GOVERNMENT EMPLOYEES COUNCIL, AFL-CIO

Mr. MCCART. Mr. Chairman, I want to share your sentiments with respect to the passing of President Griner, the past president of the American Federation of Government Employees. He was a very staunch associate of ours in the Government Employees Council, and a member of our group of officers over a long number of years.

We have supplied the subcommittee with copies of our statement, Mr. Chairman.

Mr. WALDIE. John, we will include that in the record in its entirety.

[The prepared statement referred to is as follows:]

STATEMENT OF JOHN A. MCCART, OPERATIONS DIRECTOR, GOVERNMENT
EMPLOYEES COUNCIL, AFL-CIO

Mr. Chairman and members of the subcommittee, the Council is grateful to you and your colleagues for your careful examination of the issue presented in H.R. 1281 and similar measures.

Our organization consists of 30 AFL-CIO unions representing more than 1 million employees in the postal, classified, and wage board services of the Federal Government.

Unions associated with the GEC appreciate the foresight of a number of members of the House who have introduced bills on the subject—Congressmen Murphy (N.Y.), Roybal, Howard, and Matsunaga. One of the, Representative Charles H. Wilson, is a distinguished member of this Subcommittee.

The chairman of the subcommittee, Congressman Waldie, put the central issue rather succinctly in his May 4, 1973 announcement of these hearings: "As the nation's largest employer, we must be certain that the Federal government's policy in regard to privacy of its employees is a model for the rest of the country and it is readily apparent that this is not presently the case."

If we are to maintain a free society, each Federal worker, as a citizen, must be secure in the knowledge that his right to privacy of thought and action is not only assured, but also is guarded by the government as an employer and representative of all the people.

One of the hallmarks of a democracy which requires constant vigilance is protection of the rights of the individual. Repeated intrusions by the Federal Government into the personal and private lives of its citizen employees can threaten the entire system of constitutional guarantees.

No doubt the activities of those officials administering the programs enumerated in the pending legislation are well-intentioned. But zeal to improve the public posture of the Federal Government cannot be permitted to undermine the rights of individual Federal employees.

We believe it salutary for Congress to enunciate principles safeguarding the rights of employees to complete freedom in making donations to charitable causes and participating in savings bond campaigns, and to eliminate any reference to their race, religion, or national origin.

LIE DETECTORS AND PSYCHOLOGICAL TESTS

A growing cause of concern to the trade union movement in recent years has been a significant increase in the use of lie detectors and psychological tests, on both applicants for employment and those already on the payroll.

At the outset, Mr. Chairman, a comment is in order on the position of our unions relative to national security. It is unnecessary to emphasize the commitment of the AFL-CIO movement generally and unions representing Federal employees to the security of our country.

On February 25, 1965, the governing body of the AFL-CIO adopted this policy on the use of polygraphs—"The AFL-CIO Executive Council deplores the use of so-called 'lie detectors' in public and private employment. We object to the use of these devices, not only because their claims to reliability are dubious, but because they infringe on the fundamental rights of American citizens to personal privacy."

A report by a special subcommittee of the Council in May of the same year emphasized the involvement of the Fourth and Fifth Amendments to the United States Constitution and offered these comments—

"Above and beyond these formal constitutional guarantees, democratic societies have always placed a high value on the right of individuals to privacy and to freedom from unreasonable scrutiny of their private affairs. Democracies believe that the protection of these rights outweighs the likelihood that industrial pilferage may go undetected or even that some criminals may go unpunished."

This, we believe, must be the philosophy underlying any personal program, including that for employees of the Federal Government.

Lest anyone feel that the Executive Council's conclusion on the use of lie detectors is a matter of imagination, let me refer this Subcommittee to the extensive hearings undertaken by the Subcommittee on Foreign Operations and Government Information of the House Government Operations Committee from April, 1964, to August, 1965.

They produced irrefutable evidence that the results achieved by the device have not been validated scientifically. This is in addition to the serious moral and constitutional questions raised by subjecting human beings to the indignity of making their employment and their characters dependent upon a machine for measuring the truth or falsity of responses.

The hearings tell their own story. Rather than burden the record with a detailed recital of the conclusions to be drawn, it is pertinent to quote the opinion of Dr. Jesse Orlansky of the Defense Department's Institute of Defense Analysis, in a report made available to the public in May, 1964—

"Up to the present time it has proved impossible to uncover statistically acceptable performance data to support the view held by polygraph examiners that lie detection is an effective procedure."

We are aware of no more recent development which refutes that assertion.

Military agencies have been the principal users of the device. Apparently, the Civil Service Commission recognized the value of the Subcommittee's inquiry, because it subsequently promulgated a revised policy covering the use of polygraphs.

Persons on whom the lie detector is to be applied must be advised in advance of the right to counsel; or their right to use the "self-incrimination clause" of the Fifth Amendment of the Constitution; of their right to refuse the examination; and that utilizing that right will not result in adverse action.

In the Defense Department, the use of lie detectors is still permitted for some applicants for employment and candidates for promotion.

To date, eleven states have enacted statutes prohibiting their application in private or public employment or both. Three cities and one county have approved ordinances banning polygraphs.

The magnitude of fundamental rights involved in the application of lie detectors is so great that we believe their use by the Federal Government should be discontinued.

The bills under consideration ban the use of psychological tests, except for mental diagnosis and treatment, and then only on a case-by-case basis.

Questions involving intimate details of the individual's functions, sexual thoughts, and literary tastes have been included in these tests. If the purpose is to determine emotional reactions, we submit that having to respond to such inquiries may very well be an upsetting and traumatic experience. In many cases, human beings were subjected to the humiliation and indignity of revealing highly personal aspects of their lives for perusal by total strangers.

In checking with the Civil Service Commission on this matter recently, the Council was informed that the Commission several years ago instructed agencies to discontinue psychological tests for applicants for employment and promotion.

However, as late as April, 1970, a battery of personality tests were administered to an applicant for Federal employment. The agency involved was not in the intelligence category.

In total, the test consisted of ten parts covering more than 100 pages. One section propounded more than 800 statements with true or false answers. Included were items on the applicant's sexual attitudes and the child parent relationship. Samples of the queries on these subjects are appended to this statement as Attachment I.

There was a separate section consisting of 20 pages about the individual's parents.

Finally, the project contained a series of 125 sentences to be completed by the applicant. Again, there were repeated references to the person's views on sex and evaluation of the parental relationship. Illustrations of these queries are the incomplete sentences found in Attachment II accompanying this statement.

The need for Congress to enunciate a basic policy shielding the human rights of Federal workers in these two areas—polygraphs and psychological or personality tests—continues.

We are convinced the conditions prescribed in Subsection (4), page 5, of the bills offer realistic protection for the individual and his family while safeguarding the interests of the Federal Government as an employer.

CONFLICTS OF INTEREST

Certainly it is desirable that Federal employees observe the highest degree of ethical responsibility. As appointed representatives of the people, they accept a personal obligation to exhibit honesty and integrity in their daily work, including official transactions with the public. At all times, the public must be conscious that their government through its representatives deals with them sympathetically, but without favor to one citizen over another.

At the same time, the Federal Government as an employer carries a heavy responsibility to treat each of its employees as a person with human dignity. The government employee as a citizen has rights also. Overzealous scrutiny of his personal affairs by his employer can result in loss of dignity, fear and a justified belief that somehow he occupies a position different from other citizens.

The pending bills limit disclosure of an employee's financial status to those who participate in decisions on Government contracts, grants, regulation of industry, taxes, or claims on the Federal Government.

One of the subjects about which American citizens are generally uncommunicative is their financial status, how much they invest in securities, the size of their bank accounts, the loans they make, and the debts they owe. And for good reasons. Unless they consent, matters of this kind are simply none of the other person's business. This same rationale applies to Federal employees.

Present requirements for financial disclosure administered by the Civil Service Commission cover a large number of Federal workers. To review that number of forms certainly requires the service of a large number of staff and clerical personnel. Thus the confidentiality of the submission can be easily violated.

Where an employee may use members of his family to handle his financial interests, their involvement in any job-related disclosure he is required to make should be pursued only with the greatest care. They also have rights to privacy as citizens.

A code of ethics carries with it responsibilities on the part of all parties. The Federal Government as an employer assumes a heavy responsibility to act ethically and legally in matters involving its employees.

Present Civil Service Commission regulations permit agencies to require employees at GS-13 and above to submit a report of their finances when their decisions or activities have "an economic impact on the interests of any non-Federal enterprise."

With permission of the Commission, agencies may apply financial disclosure by employees below the GS-13 level under the criterion quoted above.

We submit, Mr. Chairman, that this standard is much too vague in terms of the invasion of privacy of the individuals involved. In many instances, the same result can be achieved by codifying and publicizing in summary form the more than 25 laws on the subject and making employees aware of the need for maintaining scrupulous integrity in this matter.

In light of the disregard by the Government of the individual's right to be left alone, much greater restraint must be exercised by Federal officials in administering the public service.

UNITED FUND SOLICITATIONS

Annually, agencies undertake a campaign to solicit contributions by Federal employees to the Combined Federal Campaign. And each year, the methods used by some agencies to improve their standing in the interagency competition to achieve the highest participation are brought into question.

Our Council subscribes to the Combined Federal Campaign as a means of acquiring financial support for highly worthwhile community endeavors. However, we have maintained consistently that the decision of the individual employee as to his participation should be completely voluntary.

The November 20, 1972, edition of the Federal Employees' News Digest, published by Joe Young reported a memorandum by a high ranking Labor Department official to his executive staff expressing disappointment with the results achieved to date in one of the Department's components. Executives were instructed to speak personally with the employees in the unit to encourage their contributions and to report the results after two weeks.

The following month, John Cramer in his December 11, 1972, column in the Evening Star and Daily News described special efforts undertaken by the director of National Aeronautics and Space Administration unit here to improve participation in the Combined Federal Campaign. Supervisors were asked to confer with each employee who had not contributed and specifically request participation.

Such incidents reflect a disregard for the right of employees to make a decision on whether to subscribe to the campaign free from supervisory encouragement and influence.

BOARD OF EMPLOYEES' RIGHTS

We regard this feature of the current bills as highly important.

To insure observance of the fundamental rights described in the early sections of the bills, it is essential that there be an effective mechanism for compliance.

An important aspect of the Board's function may be overlooked. It is empowered to eliminate actions violating the basic principles in the bill "by informal methods of conference, conciliation, and persuasion." The emphasis, then, is on securing a mutually satisfactory settlement of an employee complaint found to be justified.

There are some who insist that use of the Board or a Federal court to enforce the basic precepts of the legislation is much too severe. But the practices prohibited by the bill are serious violations of individual rights. Their protection necessitates a firm and effective mechanism, which will clearly inform prospective violators that willful infractions will not be tolerated.

Moreover, employees desiring to do so will be able to pursue their complaints under grievance procedures in effect in Federal agencies.

The Council believes existence of remedies through appeals to the Board and the courts will have a salutary effect in reducing the number of incidents warranting action by employees.

OTHER ACTIVITIES

A growing practice in Federal Service involves "encounter" or "sensitivity" sessions to change the cultural and social attitudes of Federal employees.

Essentially, the plan entails meetings of small groups of individuals with supposedly conflicting views on equal rights for women, the roles of minorities, and racial issues. Under the guidance of a professional they engage in mental confrontation. In theory, the meetings are designed to have each participant shed his inhibitions and thus produce more harmony between conflicting views represented in the gathering. Typically, the exchange between those attending is intense and argumentative.

We have two basic objections to this approach. First, it introduces aspects of thought control sponsored by the Federal Government as an employer. Second, the psychological stress experienced by those participating can prove highly unsettling to some.

Last year, the Civil Service Commission found it necessary to caution Federal agencies about utilizing this technique. The Federal Times on May 24, 1972, reported steps taken by the Commission to have agencies delete any portions of their programs which are personally offensive or in bad taste.

More recently, Mike Causey's "Federal Diary" column in the March 13, 1973, Washington Post, reported the Naval Ordnance Systems Command here as requiring all its civilian employees to view at least two of three films presented by its equal opportunity office. The films deal with equal job consideration for women and minority groups. Supervisors were required to prepare lists of employees to attend the showings designated for their offices.

Mr. Chairman, the Government Employees Council has no quarrel whatsoever with the desire of the Federal Government to achieve equal consideration for all employees, regardless of sex, race, national origin, or religion, in its hiring and promotion practices. This is a goal prescribed in various laws enacted by Congress. We support it. But we can see little virtue in having Federal workers participate in programs designed to change their thought processes by compulsion.

On April 17, 1973, Washington Post columnist Mike Causey informed readers that the Department of Agriculture presented to all its employees a questionnaire designed to update personnel information for use of the Civil Service Commission's computerized Central Personnel Data File. Included in the questions were the legal voting residence and congressional district of each individual completing the questions.

As could be expected, a "flap" developed over who authorized the particular questions—Agriculture or Civil Service Commission. The last word, according to Mr. Causey (May 4, 1973) is that the Commission has instructed the Department to justify the queries with political overtones or delete them.

In the same column references are made to inquiries among high level career employees of the Health, Education and Welfare and Housing and Urban Development Departments in 1969 and 1970 about their voter registrations.

PAYROLL DEDUCTIONS

There is one provision of the bill, which causes the Council concern. Subsection (5) on page 6 prohibits coercion on employees to purchase bonds or make other contributions. In general, we find the principle enunciated to be laudatory. However, the language, "or to make donations to any institution or cause" could prove troublesome.

Under present Federal policy, employees may voluntarily designate deductions from their pay for certain defined purposes, such as trade union dues and charitable contributions. We are apprehensive that an over zealous manager might construe the language as requiring discontinuance of this practice.

In summary, the Council holds that the bills before you deal forthrightly with the constitutional and privacy rights of Federal workers. They do so by declaring the areas which the Federal Government as an employer shall not invade, and provide adequate means for workers to protect their rights under the legislation.

We trust you will find these comments helpful in your commendable efforts to assure those who work in the Federal public service that their fundamental rights as citizens will be safeguarded.

The Council recommends that the Subcommittee act favorably on H.R. 1281.

ATTACHMENT I—GOVERNMENT EMPLOYEES COUNCIL STATEMENT ON PRIVACY OF FEDERAL EMPLOYEES

My father was wonderful to me.
My sex life is quite satisfactory.
I have had some trouble because of sex.
My mother has been very good to me.
I am apprehensive about sex or related matters.
I have loved my mother very much.
I like to talk about sex.
I have been disappointed in my love life.
I thoroughly enjoy dirty jokes.
I am bothered by certain thoughts about sex.
Some of my dreams are about sex matters.
I have played boy-girl kissing games.
A seductive person of the opposite sex could be quite a challenge to my self-control.
I have been in and out of love in the past.

ATTACHMENT II—GOVERNMENT EMPLOYEES COUNCIL STATEMENT ON PRIVACY OF FEDERAL EMPLOYEES

My sexual desires _____
I like my father, but _____
With my mother, I _____
My parents _____
If I had sex relations _____
I feel that my father _____
My family treats me like _____
To me, sex _____
Because of my father _____
My family never _____

Mr. WALDIE. You may proceed, Mr. McCart.

Mr. McCART. Mr. Chairman, in your announcement of the initial hearings, put your finger on the basic problem that is involved with the legislation pending before the subcommittee. You asserted that:

As the nation's largest employer, we must be certain that the Federal Government's policy in regard to privacy of its employees is a model for the rest of the country and it is readily apparent that this is not presently the case.

We believe, Mr. Chairman, that particularly in a democratic society such as we enjoy, it is incumbent upon the Government to zealously safeguard, rights of all citizens. This surely applies to Government employees who are, of course, members of the society.

I will proceed to discuss several of the subject matters incorporated in H.R. 1281 and other bills under consideration by the subcommittee.

H.R. 1281 was introduced by a distinguished member of this subcommittee, Congressman Charles Wilson. As it was noted earlier, the Senate has once more approved legislation on this very vital and important subject.

I would like to deal first, Mr. Chairman, with the matter of the use of polygraphs and psychological tests.

We, as part of the trade union movement, are positively opposed to the use of lie detectors on two grounds:

One, the interference with the constitutional rights of the people who are subjected to the device; and two, the very serious doubts that have been cast upon the validity of this kind of technique.

The executive council of the AFL-CIO, in February 1965, stated very clearly the position of the parent union organization on the use of lie detectors.

In 1964 and 1965, a subcommittee of the House Government Operations Committee undertook extensive hearings on the use of lie detectors in the Federal service.

They found the use was fairly widespread, but these hearings revealed very clearly that there is serious controversy about the effectiveness of lie detectors. As a matter of fact, one of the prominent representatives of the Defense Department had this to say at the hearings by the subcommittee in May 1964:

Up to the present time it has proved impossible to uncover statistically acceptable performance data to support the view held by polygraph examiners that lie detection is an effective procedure.

We submit, Mr. Chairman, that there has been no more recent development that would put a better light on the effectiveness of polygraphs as a means for detecting the truth.

It is worthwhile to note that 11 States and three cities and one county have enacted statutes and ordinances either controlling or prohibiting the use of lie detectors.

With respect to psychological tests, you will recall that the pending legislation would severely control the use of psychological tests in the Federal service, and would make it possible to use them only in cases of medical diagnosis or treatment, and then only on a case-by-case basis.

The subjects that have been included in tests of this kind, involving the intimate details of the individual's sex life, literary tastes, and parental relationships, are really appalling.

Appended to our statement, Mr. Chairman, are some excerpts from a battery of tests administered to an applicant for Federal employment, consisting of some 10 parts of more than 100 pages.

One section dealt with the applicant's sexual attitudes and the child-parent relationship. A separate section of 20 pages covered information on attitudes about the individual's parents. Then there was another section of 125 sentences to be completed with repeated references to sex and parental relationships.

Mr. WALDIE. Where do they use these?

Mr. McCART. Sir?

Mr. WALDIE. Where are these appendices used?

Mr. McCART. These were taken from a test that was administered to an applicant for a position in the Department of Interior, who was referred to a psychiatrist following his physical examination.

Just as an aside, Mr. Chairman, the individual involved overcame all of these obstacles and was finally employed, and has since been killed in action. He died a heroic death as an employee.

Mr. WALDIE. But, John, what I don't understand is: Is this a common test given to all, or was there some peculiar reason why this individual was given the test?

Mr. McCART. No, this is not a common test that is given to all. But it is given in a sufficient number of instances to necessitate some very serious controls over it.

Mr. WALDIE. What are the keys that determine when this test, these questions, are asked of employees?

Mr. McCART. I think there are two keys, one if the employing agency feels it necessary to inquire into the psychological background of the individual as a result of a physical examination, and secondly, for specific types of jobs—security positions, investigative positions, these kinds of tests may well be used routinely by the agencies.

Mr. WALDIE. Well, is this a standardized test?

Mr. McCART. No, this is a test that was administered by a private psychiatrist to whom the applicant was referred.

Mr. WALDIE. I understand that. But is it just that psychiatrist's questions or is it a governmental questionnaire?

Mr. McCART. No, these were the psychiatrist's test, his questions.

Mr. WALDIE. Well, that is a little different than what I had thought.

Are there any similar to these that the Government as a matter of practice administers to its employees?

Mr. McCART. Yes, sir. If you or the staff have an opportunity to review the hearings of the Senate Constitutional Rights Subcommittee, you will notice—

Mr. WALDIE. I am curious, by the way, how you got these questions from the psychiatrist.

Mr. McCART. I didn't secure them from the psychiatrist.

Mr. WALDIE. Someone did.

Mr. McCART. As I say, since the individual is now deceased, I don't want to disclose the specific identity, but—

Mr. WALDIE. No, I don't want the identity of the individual. But it seems to me we are dealing with a doctor-patient relationship, and these may have some legitimate explanation on the part of the psychiatrist.

But what I gather, for purposes of our hearing, is that these questions aren't governmentally devised.

Mr. McCART. No; that is correct.

Mr. WALDIE. Neither does the Government insist that they be answered.

I presume, as a part of that employee's examination, a psychiatric evaluation was requested.

Mr. McCART. That is correct.

Mr. WALDIE. So the question ought to really be not whether these are proper questions to ask pursuant to a psychiatric evaluation. The question should be: Are we entitled, as employers, to ask for a psychiatric evaluation of a possible employee.

Mr. McCART. I think the interpretation is twofold. The point you raise is certainly appropriate.

Mr. WALDIE. What is your answer to that?

Mr. McCART. Whether people should be referred to psychiatrists; and second, having been referred to psychiatrists to determine whether they have ability to perform a Federal function, whether they should be subjected to these kinds of questions?

Mr. WALDIE. Well, let me ask you this:

Do you think we have the right to refer prospective employees for psychiatric evaluation?

Mr. McCART. I think the proposal in the bill is a quite reasonable one, Mr. Chairman, and that is that these tests be used only in cases of mental diagnosis and treatment, and then only on a case-by-case basis.

Mr. WALDIE. Well, these questions were clearly on a case-by-case basis; right? This was a series of questions asked one patient?

This is why I asked: Are these standardized?

Mr. McCART. Yes.

Mr. WALDIE. Would not these questions comply with the standard in the bill, John? Would the bill prohibit a psychiatrist asking these questions?

Mr. McCART. No, not once the individual has been referred.

Mr. WALDIE. It would not, would it?

Mr. McCART. No.

Mr. WALDIE. So if these questions constitute an invasion of privacy of the individual—and I presume they were included as evidence of that—that is not precluded by the bill proposed.

Mr. McCART. No, not once an individual has been referred.

Mr. WALDIE. That is correct. And under the bill, that is permitted, is it?

Mr. McCART. There would be no control over content of the questions in that case.

Mr. WALDIE. And should there be?

Mr. McCART. Well, Mr. Chairman, it is difficult for me to render an opinion in terms of psychiatric or medical adequacy.

Mr. WALDIE. It is for me, too.

Mr. WALDIE. But I, as an individual, would react in a very hostile fashion to this kind of probing of people who either work for or want to work for the Federal Government.

Mr. WALDIE. I do, too. But conceding we have the right to refer people for psychiatric consultation just as for medical examinations, a lot of medical examinations are offensive to me. But I don't question the doctor's right to do things to me while conducting a medical examination because they are offensive to me.

These questions are offensive to me, too, but I gather it is the psychiatrist's judgment on the patient.

I guess I am pressing you because you are citing these questions as the type of thing the bill will preclude. And I am only responding to you that the bill will not preclude this sort of thing being done, because

the bill says the psychiatric evaluation is okay on a case-by-case basis, and we ought not to tell the psychiatrist, "You may not ask these questions in the performance of your responsibility."

These would be very objectionable if they were standardized questions as to an employee or class of employees, but they are not.

Mr. McCART. It could very well be, Mr. Chairman, that your reference to the private physician is valid. On the other hand, I noted earlier that in some instances Federal agencies use these techniques in determining suitability or acceptability of applicants for Federal jobs in their internal evaluation of applications.

Mr. WALDIE. Exactly.

Now, the next question I want to ask you in this case is: Were these questions given by the psychiatrist and the responses to the questions—were they given to the employer to become a part of the employee's record, or only the conclusions that the psychiatrist arrived at from having given these questions?

Do you know?

Mr. McCART. I don't know, Mr. Chairman.

Mr. WALDIE. I guess that would be the key. If these questions that the psychiatrist asked and the responses of the employee became a part of the employee's personnel file, it could be enormously embarrassing and enormously damaging. But if only the psychiatrist's conclusion—and the conclusion in this case was there were no problems in employing him—I presume these questions don't become a part of his file.

Mr. McCART. I just don't know. It is quite possible. Fortunately for this individual, the entire incident turned out successfully.

Mr. WALDIE. Yes.

Mr. McCART. And he discharged his duties with great honor, to the extent of giving up his life.

On conflict of interest, which is treated in the legislation also, we subscribe to the concept that Federal workers should observe the highest degree of responsibility in performing their duties.

Concomitantly, the Federal Government has an obligation to treat each of its employees with human dignity, and also to observe the rights of the families of Federal workers.

Most of us are rather uncommunicative about our financial affairs, feeling that these are generally not anyone else's business. Under the present policy, employees at GS-13 or above can be required to report on their finances if their decisions or activities, quote, "have an economic impact on the interests of any non-Federal enterprise," whatever that may mean.

While confidentiality is assured, it is obviously necessary for clerical individuals, administrative individuals, to process these disclosure forms, and confidentiality becomes a question.

In addition to the agency's ability to require anyone at GS-13 and above to provide financial disclosure, with the permission of the Civil Service Commission agencies can require employees below GS-13 to submit to financial disclosure.

And in addition to that, Mr. Chairman, we also have the problem of relatives of the Federal employees in instances where members of a family take care of the financial interests of the individuals.

Thus the bill makes a good attempt to outline more specifically, or to restrict the nature of the financial disclosure requirements.

The next item is the question of charitable campaigns and charitable contributions.

The record is rather clear in this case, Mr. Chairman, each year that the annual Combined Fund has been undertaken in the Federal agencies, we hear and read about incidents of pressure on employees, some of which we recite in our testimony. These citations are for the year of 1972, since the testimony was written for last year's hearings.

Subsequent to that, in the 1973 campaign you will recall that the November 7, 1973, edition of the Federal Times cited the situation of the Philadelphia shipyard where the shipyard publication contained a list of the individuals who had given their fair share, "their fair share" meaning some predetermined amount that it was felt a person should give.

And then in The Evening Star of March 11, 1974, John Cramer described the situation at Long Beach Naval Shipyard where individuals were asked to sign statements—I'm sorry, not to sign but asked to submit statements that they would not give, those who did not desire to give.

We subscribe totally to the one-fund approach. We have insisted over more than a decade that true confidentiality be observed. And these instances represent invasions of individuals' private rights.

The Board of Employees' Rights—I would only offer this general comment.

This feature of the bill has been severely criticized by those who don't support the legislation as being much too severe and stringent. We believe that the rights involved in this bill are fundamental, and it requires a stringent, severe notice to all concerned that they are going to be observed and they are going to be enforced. From that standpoint, the Board of Employees' Rights is completely justified.

Next, our statement deals with the use of encounter and sensitivity sessions, which are a rather recent development.

I don't know that it is necessary to include specific provisions in the legislation to control this. The Civil Service Commission and the Federal agencies are on sufficient notice at this point that these questionable practices will be either very carefully controlled or will not be used at all.

We do have a small language problem, Mr. Chairman, in conjunction with subsection 5, page 6. That deals with payroll deductions.

The bill prohibits coercion of any employees to make any contributions—and this is very desirable. But the language that is used, "or to make donations to any institution or cause," we are concerned could be open to interpretation that would prevent employees from making their charitable contributions on a payroll deduction basis, or their dues to their trade unions on a payroll deduction basis. I think it is simply a matter of clearing the language.

Mr. Chairman, we want to thank you and your associates for pursuing this very important and serious matter. I have one final suggestion to offer to you.

Since 1970 there has been doubt cast upon the entitlement of the postal employees to share in the statutory benefits in light of the collective bargaining system that now exists in that agency. You will

recall that this has been a source of some concern and controversy within the committee.

A matter like this we don't believe really involves negotiation and bargaining. The rights that are involved here are very fundamental and basic. Therefore, we strongly recommend that if there is any doubt whatsoever about the application of this bill, it be amended to apply to the postal service.

Mr. Chairman, that concludes my statement.

I will be happy to respond to any questions.

Mr. WALDIE. For some reason I have not been very much aware of the sensitivity sessions that you refer to under "Other Activities."

What is the status of those now?

Mr. McCART. I can't tell you what the status is at the moment. A couple of years ago, there was a real flurry of activity in this area, done usually on a contract basis with firms that specialize in this kind of work.

And as we note in the statement, we certainly fully support equal rights and equal opportunities for all Federal workers regardless of age, sex, national origin, color, creed. But this technique to us really smacks of thought control.

Let me describe it in just a little more detail.

Typically, individuals are selected and informed that they should attend these encounter sessions. At one point it was down to the GS-5 level.

These people will be gathered together, and there will be an agitator or an instigator in the group. The purpose of the agitator or the instigator is to upset people so that they will lose their inhibitions and reveal whatever problems they may have in the areas of equal rights for minorities or women, and then hopefully change their attitudes on that.

It can involve abusive language and obscene language, things that are offensive to people who do not particularly care to participate.

As a matter of fact, in one instance an individual had to secure a certificate from a physician so that she would not be forced to attend one of these sessions.

Later, the Civil Service Commission did issue guidelines to agencies telling them to be certain that they did not include any offensive tactics in this kind of a program.

But the fact that you bring people into a controlled session connected with their work, which is designed to change their social attitudes outside the workplace, really leaves serious question in our minds about whether this is not really an invasion, notwithstanding what we all subscribe to, the end result of trying to have people accept equal opportunities for everyone.

Mr. WALDIE. Is that still now being practiced, these sensitivity sessions?

Mr. McCART. Well, it was until a year ago, Mr. Chairman. I have not checked it since the statement was prepared for your prior hearings. I would be happy to check on it.

Mr. WALDIE. I would appreciate it if you would. We will check it, too.

And attendance is compulsory?

Mr. McCART. At the outset attendance was compulsory. There was some alleviation of it. But the mere fact that the individuals are designated by the agencies for this—

Mr. WALDIE. Makes it compulsory; is that right?

Mr. McCART. Yes, certainly to some degree. It takes a strong individual to say, "No, I don't want to."

And the stronger individual who may say, "I don't want to," may immediately be suspect of not having the proper attitude on matters of equal opportunity and equal treatment for all employees, when that may not be the case at all.

Mr. WALDIE. Yes.

Mr. McCART. That is the suspicion.

Mr. WALDIE. I have no further questions, Mr. McCart. Thank you.

Mr. McCART. Thank you, Mr. Chairman.

Mr. WALDIE. I appreciate your extensive and thorough examination of the problems that the bill seeks to address, and your suggestions, and will consider them very carefully, you may be sure.

Mr. McCART. Thank you.

Mr. WALDIE. This meeting is adjourned.

[Whereupon, at 11:40 a.m., the hearing was adjourned, subject to the call of the Chair.]

[The letter which follows was received for inclusion in the record, subsequent to the hearing:]

GOVERNMENT EMPLOYEES COUNCIL—AFL—CIO,
WASHINGTON, D.C.
April 30, 1974.

HON. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits, House Committee on Post Office and Civil Service, 406 Cannon House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: During my appearance before your Subcommittee on April 24 to testify on invasion of Federal employees' privacy, I offered comments on the use of sensitivity and encounter training techniques by Federal agencies to change employee attitudes on the status of minority and female employees in the work force.

You inquired about the prevalence of this practice at the present time.

I have requested the Civil Service Commission to supply this information. CSC informed me that its last issuance on the subject occurred on April 13, 1972 in Bulletin No. 410-68. A copy of that document is enclosed. It did not require agencies to report further to the Commission on the subject. As a result, it has no knowledge about the extent to which such sessions are used at present. CSC was unable to refer to any other central source to obtain this kind of information.

I hope this communication is responsive to the question you propounded.

Respectfully yours,

JOHN A. McCART,
Operations Director.

Enclosure.

UNITED STATES CIVIL SERVICE COMMISSION,
WASHINGTON, D.C.,
April 13, 1972.

Bulletin No. 410-68.

Subject: Employee and Management Development.

Heads of Agencies and Independent Establishments:

1. In carrying out their responsibilities for the training and development of employees, department and agency heads have full legal authority to prescribe both the content and methods of training. Generally, we believe this authority has been exercised with care on the part of management officials. Occasionally, however, unfortunate results occur that are not intended by those responsible for authorizing or conducting a particular training program.

2. In recent months a number of complaints have been received by or forwarded to the Commission relating to training involving interpersonal behavior which some individuals have found personally offensive, psychologically stressful, or invasive of their personal privacy. While these kinds of incidents and results are definitely not common, they have occurred. It is incumbent upon all responsible agency officials to take whatever steps are necessary to preclude such occurrences.

3. Each department and agency should have or establish such administrative procedures as may be required in planning and conducting training programs to ensure to the fullest extent possible that they do not contain elements which are likely to be personally offensive, psychologically stressful, or invasive of the personal privacy of individual participants.

BERNARD ROSEN,
Executive Director.

RIGHT TO PRIVACY OF FEDERAL EMPLOYEES

THURSDAY, AUGUST 8, 1974

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 9:45 a.m. in room 210, Cannon House Office Building, the Honorable Jerome R. Waldie (chairman of the subcommittee) presiding.

Mr. WALDIE. The subcommittee will come to order.

Today, the subcommittee is resuming its hearings into the invasion of the rights to privacy of Federal employees by the executive agencies.

The purpose of this hearing is to examine and inquire into the personnel investigative policies within the Civil Service Commission and other executive agencies, today specifically the Department of Defense.

There is a definite need for hearings into this matter. Vice President Ford said in a June 26 speech:

The citizen must know where information about him is stored, why it is needed and what information the files contain. Each citizen must have access when he wants access.

The primary reason for this subcommittee inquiry is to educate Congress and the public regarding the problems of Government intrusion and unnecessary excesses upon the rights of the Federal civil servant.

Under the present grants of authority of the Civil Service Commission and the executive agencies, relating to the investigative policies of those agencies, the potential for abuse is greatest in several ways. Unwarranted problems arise when grants of authority to conduct operations as sensitive as personnel investigations are open to interpretation, are vague, virtually limitless and, most importantly, not particularly susceptible to any effective means of oversight.

Executive Orders 9830—Truman, 1947—and 10450—Eisenhower, 1953—form the basis for agency responsibility in the matter of personnel investigations. What is the most troubling is the fact that within these orders there are no clauses which require strong accountability by the agencies for these investigative procedures. This is one of the major points of concern that we will address ourselves to in this hearing today.

We have invited representatives of the Civil Service Commission and the Department of Defense to testify before the subcommittee on the matter of personnel investigations within the agencies.

Mr. David Cooke, Assistant Secretary of Defense for Administration, and Mr. Joseph Liebling, Deputy Assistant Secretary of Defense

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for Security Policy, will be our first witnesses, and you have a third gentleman there, I believe.

STATEMENT OF DAVID O. COOKE, ASSISTANT SECRETARY OF DEFENSE FOR ADMINISTRATION, ACCOMPANIED BY JOSEPH LIEBLING, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR SECURITY POLICY, AND BERNARD O'DONNELL, ASSISTANT DIRECTOR FOR OPERATIONS OF THE DEFENSE INVESTIGATIVE SERVICE

Mr. COOKE. I also have Mr. Bernard O'Donnell, Assistant Director for Operations of the Defense Investigative Service. Because you indicated an interest in the actual operations of that agency, Mr. O'Donnell is with us.

Mr. WALDIE. Fine. Before you proceed, let me mention for the record a letter addressed to me from Mr. W. Vincent Rakestraw, Assistant Attorney General, involving a request that the committee had made for the appearance of Brig. Gen. Joseph J. Cappucci as a witness. The letter of the Department of Justice is to the effect that there is pending civil litigation involving General Cappucci, and that in the Department's view, it would be jeopardizing were his testimony to be taken today and by this letter, the Department of Justice has requested a postponement of his appearance, and has indicated their desire to cooperate with the committee inquiry.

The request that General Cappucci not be required to appear will be honored.

Mr. Cooke, you may proceed as you desire.

Mr. COOKE. Mr. Chairman, in behalf of the Department of Defense, we appreciate the decision that you reached with respect to the request of the Department of Justice. It demonstrates again your concern for the rights of the individual in the course of your hearings, and we do thank you.

[The letter referred to is as follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., August 8, 1974.

Hon. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that the House Post Office and Civil Service Subcommittee on Retirement and Employee Benefits has scheduled hearings on August 8, 1974 to consider federal employees' rights to privacy, and that Brig. Gen. Joseph J. Cappucci has been asked to appear as a witness before your Subcommittee.

This letter is to advise you that the Department of Justice is currently representing General Cappucci and other defendants in a civil suit for damages before the United States District Court for the District of Columbia, *A. Ernest Fitzgerald v. Robert C. Seamans, Jr., et al.*, Civil Action 178-74 (1974), and that the court currently has agreed to consider and hear arguments on a Motion for Summary Judgment in this litigation. It is anticipated that the court's ruling on this matter will be made within the next two months.

Plaintiff's allegations in the Fitzgerald case generally relate to a special inquiry previously conducted by the Office of Special Investigations, Department of the Air Force. Since it is our understanding that the Subcommittee seeks to inquire into matters that are immediately involved in this litigation, i.e., General Cappucci's involvement in the above OSI inquiry, we request that you defer his

appearance before your Subcommittee until such time as the court has disposed of the defendant's pending motion. This request is made in the interest of fairness and due process to General Cappucci, who remains a defendant in this litigation.

The Department will, of course, make available to you all matters of public record filed in this litigation and it is the intent of the Department to cooperate in whatever manner possible with your Subcommittee's inquiry in this important area.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

Mr. COOKE. We appreciate the opportunity to appear before this subcommittee to outline the civilian personnel investigations policies of the Department of Defense and to express the Department view on Federal employees' rights to privacy. As you requested, we have submitted to the subcommittee answers to the questions as set out in your letter of July 16, 1974, and I will cover those particular matters in detail.

It should be said at the outset that the Department of Defense is keenly aware that along with responsibility for making the investigations of civilian applicants and employees which are required by law or regulation there runs an obligation to have due regard for the rights of the individuals whom it must investigate.

Perhaps I should begin by stating that the Department of Defense investigates people for the same reason any employer investigates prospective employees. It is simply that we want good people. For us the problem of having good, reliable personnel is heightened by security considerations—by the necessity that a high proportion of our personnel have access to classified information.

All of our personnel security policies exist to assure the trustworthiness of those upon whom we depend to protect the United States. These policies are based upon law, justifiable need and the concept of fair play. I emphasize that, within our resources, every effort is made to protect our national security interests without unduly impinging on individual freedoms guaranteed by the U.S. Constitution.

We are not in the business of investigating persons who are not affiliated with the Department of Defense. In fact, DOD Directive 5200.27 expressly forbids collecting, reporting or storing information on individuals or organizations not affiliated with the Department of Defense.

The point I am trying to make is that the people we are investigating are in the position of employee-investigations. They may be civil servants, military personnel, or defense contractor personnel who are working on classified defense contracts. Incidentally, with respect to our industrial securities program, we handle that program not only for the Department of Defense, but for 13 other executive departments and agencies.

Authority for investigation of individuals affiliated with the Department of Defense is in Executive Orders 10450, 11652, 10865 and in a series of statutes which are codified as 5 USCA 3301, 7301 and 7532. Further, Executive Order 10450 provides that "... appointment of each civilian officer or employee in any Department or Agency of the Government shall be made subject to investigation."

Under the provisions of Executive Order 10450 the Department of Defense as an employer of civilian personnel must insure that the

hiring and retention of each employee is clearly consistent with the interests of national security. In passing I should mention that the Secretary of Defense has imposed a parallel requirement with respect to military personnel to insure that their service also is clearly consistent with the interests of national security. This requirement is not specifically provided for by Executive order but is a reflection of the national policy expressed in Executive Order 10450.

Under the provisions of Executive Order 10450, every full-time civilian employee of the Department of Defense must be investigated. The scope of the investigation which is required is related to the sensitivity of the position which the individual will fill.

Civilian positions of the Department of Defense are designated as critical-sensitive, non-critical-sensitive and non-sensitive on the basis of the adverse effect on the national security which the occupant of the position could bring about because of the nature of the position. This designation of positions therefore depends upon the nature of the job and the need for access to classified information.

Critical-sensitive positions involve access to top secret information, development or approval of war plans, or overall policies or programs and the highest degree of public trust.

Non-critical sensitive positions involve access to secret or confidential information of fiduciary relationships of a lesser order of impact and effect on the national security.

All other positions are designated as non-sensitive.

The least investigation is conducted for applicants and appointees to non-critical sensitive and non-sensitive positions. This investigation, the National Agency Check and Inquiry—NACI—includes a check of the criminal files of the FBI and of the investigative files of the U.S. Civil Service Commission, the Army, Navy, Air Force and Coast Guard when the individual has had prior civilian employment or prior service in a military service. The other element of the NACI consists of written inquiries to former employers, supervisors, references, schools and law enforcement agencies. The NACI is the minimum investigation for employment in any civilian DOD position. These generally are conducted by the Civil Service Commission and the results furnished to the Department of Defense. Normally investigations for appointment to sensitive positions are completed prior to such appointment while investigations for appointment to non-sensitive positions generally are accomplished subsequent to appointment.

For appointment or assignment to a critical-sensitive position an employee receives a background investigation. The purpose of the background investigation is to obtain full facts about the background and activities of the applicant or employee and particularly his character, habits, morals, reputation, associations, and loyalty so that the individual's fitness for the employment can be determined. Every background investigation includes a national agency check, NAC, interviews with present and former employees, supervisors, school authorities, and associates who are knowledgeable, and checks of police and credit records, as necessary to obtain a comprehensive and well-rounded picture of the individual.

Nonetheless, background investigations are limited to obtaining the information which must be known in order to make a determination

of an individual's fitness for employment. Thus inquiries into religious beliefs and affiliations of a nonsubversive nature, affiliation with labor unions and opinions regarding legislative policies are not proper and are specifically prohibited by DOD as a matter of policy.

Background investigations of Department of Defense applicants and employees are conducted by the Defense Investigative Service for DOD components including the military services and the Office of the Secretary of Defense.

The Defense Investigative Service or DIS was established in 1972 as a separate operating agency of the Department of Defense to provide DOD components a single centrally directed personnel security investigative service. Personnel security investigations of military personnel and of employees of contractors who must be cleared for access to classified information under the DOD industrial security program also are conducted by the Defense Investigative Service.

In short, personnel security investigations in the Department of Defense are designed to insure that employment and retention in employment of civilian officers and employees is clearly consistent with the interests of national security and that only persons who have been determined to be trustworthy will be permitted access to classified information. The scope of these investigations is limited to matters which are relevant. Inquiries into private matters which have no bearing on the suitability of an individual for employment or access to classified information are avoided.

Personnel security investigative files are, of course, an accumulation of personal information and are maintained in confidence. This concern for the privacy of personal information is not new.

Executive Order No. 10450 directed that investigative reports and information would remain the property of the investigating agency and be maintained in confidence and prohibited access to such reports and information except by other departments and agencies conducting security programs under Executive Order 10450. Investigative files are never released to private organizations.

There are also controls upon access to personnel security investigation files and information within DOD. For example, within the Defense Investigative Service only those personnel who are conducting or directing an investigation are permitted access to personal information gathered during the investigative process.

Also, only commanders and heads of activities authorized to request personnel investigations are authorized access to the Defense Investigative Service files for the purpose of determining that an employment is clearly consistent with the interests of national security or that an individual is trustworthy for access to classified information. Investigative files are marked with restrictive legends warning that the contents may be disclosed only to persons whose official duties require access to such information.

In the case of information concerning juveniles additional warning legends are used to assure special care in handling.

A number of committees have questioned why a civilian employee of the Department of Defense is not permitted access to his personnel security files. There are good reasons in our judgment for that policy.

The whole purpose of a personnel security investigation is to ob-

tain accurate objective information and appraisal of the person being investigated. It is almost axiomatic to observe that if persons who are interviewed know that the interview will be revealed to the subject of the investigation, it will have an effect on their willingness to give a forthright candid statement of what they know about the subject.

There are endless reasons why this is so. He might fear job discrimination or retaliation. He might even fear for his personal safety in some situations.

But I must emphasize this: The fact that an individual does not have access to his security file does not mean he has no opportunity to explain or counteract derogatory information that may be contained in it. As a matter of procedure, the Defense Investigative Service gives an individual the opportunity to explain any such information it may have developed, before it completes its investigation.

In addition, if any adverse action is to be taken against an individual—military or civilian—as a result of a personnel security investigation he is advised in advance of the basis of the proposed action and given the right to refute the alleged facts or explain them. If the consequences are serious this administrative due process includes written charges, the right to counsel, the right to hearing, the right to present and cross-examine witnesses, the right to a written decision and the right to appeal.

As I stated earlier, the DOD has recognized and accepted an obligation to protect the rights of the individuals whom by law or regulation it is required to investigate and has moved effectively to meet that obligation by limiting investigations to matter which is relevant and controlling strictly the use and dissemination of the personnel security investigative files.

In short, we seek only what we need and we protect what we get.

Thank you, Mr. Chairman, for the opportunity to present this testimony. I shall be glad to furnish any additional information desired by the committee.

Mr. WALDIE. Do you have any other materials you desire to present before I ask questions?

Mr. COOKE. No; I do not.

Mr. WALDIE. Counsel will ask questions at this time.

Mr. GWINN. Mr. Cooke, in your testimony, you stated that in the case of an adverse action, an employee would have the right to see charges, or would hear the evidence brought against him that your organization used to determine whether he should be employed by the Defense Department.

However, if no formal adverse action were taken, would it not be possible that these investigative files could follow an employee through his career in the Government, being used periodically, or being viewed periodically by people who may not in any way take an adverse action against him, but by people who would be acting upon such issues as his promotion, assignment and retention in the service, demotion, or increases in grade?

Is this not something that is a possible area of abuse?

Mr. COOKE. I really don't believe so, for this reason: As I indicated in our reply to written questions, the personnel investigative file is not part of the personnel records of the individual concerned. The superiors of an individual normally do not have access to that personal investigative file at all.

It is only in the case of adjudication. Only in the case of someone authorized to adjudicate whether the individual is, one, acceptable for a critical-sensitive position, or for access to classified information, let's say top secret, for example, that someone in the organization would review personnel file.

Now, speaking within the office of the Secretary of Defense, I have a security division—not security policy, but an operating security division and that is the only division that looks at those files for the purpose of making an adjudicatory judgment.

The individual's normal superior does not have the right to access to the files and indeed does not see them. I think that is generally the practice within the Department of Defense.

Mr. GWINN. What is there to prevent its not being accepted practice? That is our concern.

Mr. COOKE. I think because our regulations provide only for rather strict access to those files, only if there is a need to see them, and the average superior has no need to see those files, because he is not the one who sees to the responsibility of making a decision as to access to classified information.

So the files are very narrowly, quite closely restricted.

Mr. GWINN. In your statement on page 4, you refer to a background investigation. In that background investigation you listed certain areas into which you made inquiry, and these were as to an employee's character, habits, morals, reputation, associations, so that the individual's fitness for the employment can be determined.

I assume this is part of your NACI, is that correct?

Mr. COOKE. What we are talking about is a difference in depth. A background investigation is not part of the NACI.

Mr. GWINN. It is over and beyond that?

Mr. COOKE. Beyond that, the requirements for a background investigation as far as civilian personnel are concerned are spelled out in Executive order in 10450, but I think the NACI is essentially a record check, plus written inquiries such as, "Did he complete the college education claimed?"

The background investigation is actually conducted by investigative agents who go out and interview and check, and it is in much greater detail and depth.

Mr. GWINN. Are these background investigations conducted in response to turning up suspect findings in the NACI?

Mr. COOKE. No. If there are discrepancies and questions raised as a result of a NACI, those questions are resolved by specific inquiry, and, if necessary, investigation, but that does not reach the scope or the range of a background investigation.

A background investigation is used under the Executive order for the purpose of clearance for assignment to a critical-sensitive position or access to top secret information.

Mr. WALDIE. Let me interrupt here a moment. In this line of questioning, in your responses to the committee on page 2, question 5, what were the actual numbers of investigations conducted on Defense employees in each of the last 4 years beyond the normal NACI procedure?

How many of these were national security investigations? Your response is the following number of investigations conducted on Defense employees have been expanded beyond normal NACI procedures.

Data developed by DOD do not differentiate between suitability to national security investigations. I don't understand that.

A suitability investigation is essentially a NACI investigation, isn't it? It clearly is nowhere near the extent of a national security investigation, and why would your figures not differentiate?

Mr. COOKE. Mr. Chairman, many of the same factors are characteristics which would affect suitability would also affect eligibility for access to classified information. For instance, if an individual is a habitual alcoholic who runs off at the mouth when he has a few drinks; that is a question of suitability, and it is also a question whether we should trust such a man with access to classified information.

Mr. WALDIE. Isn't the answer really that all your investigations are conducted under section 8 standards of 10450, rather than suitability criteria? You apply a much higher standard, do you not? Do you ever utilize the suitability disqualifications standards as set forth in the Federal Personnel Manual, subchapter 2, "Suitability Disqualifications"?

I gather those are the standards that most agencies use for suitability investigations.

Mr. COOKE. As a matter of fact, our governing Department of Defense directive 5210.7, specifically requires us insofar as possible in the case of an adverse action to proceed on the basis of suitability rather than national security, and that is echoed—

Mr. WALDIE. If that is so, why do your statistics, then, not break down the investigations between suitability and national security?

Mr. COOKE. Because, as I said, there is a great overlap between a piece of adverse information, which could at the same time involve both suitability and security. It could justify a dismissal or some other adverse action on the grounds of suitability, and could also justify the same adverse action on the grounds of national security considerations.

Mr. WALDIE. Are we talking in question 5 of adverse action investigations?

Mr. COOKE. Question 5, you asked what were the number of actual investigations, and how many were for national security. Our answer and the figures given show the investigations which were not expanded, generally. Generally, they were background investigations required either because the prospective employee was being considered for employment or is an employee being considered for assignment to a critical position.

Mr. WALDIE. Then classified action has nothing to do with the question.

Mr. COOKE. I think I got off on a tangent there.

Mr. WALDIE. Why do you not distinguish between suitability and national security investigations? These are not adverse actions.

Mr. COOKE. Our records—simply the standards for trustworthiness under Executive Order 10450 we regard broadly as suitability as distinguished from the requirements of Executive Order 11652.

Mr. WALDIE. That is what I started out with, the assumption that you really did not apply suitability at all, that you applied only the standards of section 8 of Executive Order 10450 in your investigations.

Mr. COOKE. There is considerable overlap between those and the requirements of chapter 731 of the Federal Personnel Manual.

Mr. WALDIE. Where is the overlap?

Mr. COOKE. Looking at Federal Personnel Manual 731-7, subchapter 2-1, "Reasons for Removal", under subchapters entitled "Suitability Disqualifications," that includes "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct."

I suggest that broad standard has a considerable amount of overlap between the standards contained in Executive Order 10450, section 8, and if you will bear with me, I will refer to those.

Mr. WALDIE. Any criminal, infamous, dishonest, immoral conduct, habitual use of intoxicants, and so forth.

Mr. COOKE. You have laid the standards out together. Many of the reasons specified in the suitability disqualifications would fall also under one of the cited disqualifications.

Mr. WALDIE. Which is the broader of the two?

Mr. COOKE. In my opinion, 10450 is broader, because it, at any rate, is more specific.

Mr. WALDIE. Well, less specific. You have more reasons to disqualify than in 10450, section 8, do you not?

Mr. COOKE. Well, criminal conduct, for example, specified is the second ground for disqualification in the FPM, would also cover the violations of espionage and other specifically spelled out in Executive Order 10450. So, in that sense, I would suggest that the listed reasons for disqualification for suitability are broader in the sense that they are less specific than Executive Order 10450.

Mr. WALDIE. I won't argue with you. I see identical words, except in 10450 I see additional words. I do not understand why there are two standards. Can you tell me that? Why are there two standards set forth, one suitability disqualification and the other national security? Is it possible you could be found suitably qualified and disqualified for national security access?

Mr. COOKE. Yes, it is possible.

Mr. WALDIE. It is?

Mr. COOKE. Yes.

Mr. WALDIE. Do you all agree on that?

Mr. COOKE. Let me give you an example which occurs. You could be found suitable under the FPM and not suitable for access to classified information. Let us take the example of the so-called hostage situation, where the individual's parents, brothers or sisters may be living behind the Iron Curtain, where there is the possibility that threats against the well-being of his loved ones could raise the possibility of a security risk. That would be one situation that comes readily to mind.

Mr. WALDIE. Tell me where that would be covered under section 8. Would that be 5?

Mr. COOKE. It is 5.

Mr. WALDIE. OK.

Mr. Gwinn may have more questions but I want to ask a couple more. These files that are accumulated, whatever standard is used, are physically kept how? Can you describe that to me?

Mr. COOKE. I can, but Mr. O'Donnell can tell you exactly how. My answer to you is that they are physically segregated and under surveillance, but I would like to have the specifics from Mr. O'Donnell.

Mr. O'DONNELL. The files are maintained in a secure building, one copy of the report, and they are maintained at Fort Holabird, Md.

That is the extent of our holding of those files, and they are not otherwise maintained, except as temporarily used in the granting of clearances and adjudication procedures.

Mr. WALDIE. Would the original file be transported to wherever those procedures are?

Mr. O'DONNELL. No; a copy of the final report of the investigation is provided to the commander for his action and use.

Mr. WALDIE. Then what happens to it?

Mr. O'DONNELL. It is maintained similarly as a security file, it is treated as a classified document.

Mr. WALDIE. And maintained at that base?

Mr. O'DONNELL. Yes.

Mr. WALDIE. Then if the employee moves to another base and there is another promotion or something, and then another copy is kept at that base?

Mr. O'DONNELL. Usually the same copy, or the commander may request another if that first copy has been destroyed or returned to us, as is occasionally done, for our destruction.

Mr. WALDIE. If I were to take a look at Mr. Jones and ask to see his file at Fort Holabird, would you be able to tell me at Fort Holabird, how often that file has been proliferated into other areas?

Mr. O'DONNELL. Yes.

Mr. WALDIE. The notations would be there?

Mr. O'DONNELL. A full-page document completed by the person who had access to the file.

Mr. WALDIE. So there is no question that at least wherever those files are at a given moment in time, there is a record of them?

Mr. O'DONNELL. Yes.

Mr. WALDIE. Who has access to the file, first, before this leaves Fort Holabird, the copy? Who has access at Fort Holabird?

Mr. O'DONNELL. The people who conducted the investigation. This is a transitory access, in that the full file, the full report, is put together at Fort Holabird. The investigating agent possesses only that portion of the investigation with which he has been charged.

Similarly, the administrative personnel have access usually through electrical communication to inserts that are prepared, received, and compiled into this report. The people having access are the supervisory people who are charged with putting the report together, and subsequently, the files people. By the way—I am speaking of this compilation and filing all within one building.

This is a secure installation, a secure building, and these people are cleared employees.

Mr. WALDIE. Once the report is included and filed, how is access then obtained to that report, and by whom?

Mr. O'DONNELL. The access comes through the Defense central indexes of investigations, which is the computerized index.

Mr. WALDIE. No, no, I mean—

Mr. O'DONNELL. This is how you secure access.

Mr. WALDIE. How do you determine who secures access?

Mr. O'DONNELL. If it is not within the Department of Defense, someone who is known to us as a requester.

Mr. WALDIE. What do you mean "a requester"?

Mr. O'DONNELL. One who has requested an investigation, the commander or the Office of the Secretary of Defense.

Mr. WALDIE. Can anyone within the Department of Defense request an investigation?

Mr. O'DONNELL. No, they must be in the command position.

Mr. WALDIE. How is that described?

Mr. O'DONNELL. There is a form on the request that must be signed and gives details—

Mr. COOKE. If I may interrupt Mr. Chairman, the DIS does not instigate a personnel security investigation unless there has been a request for it by, usually, the commander.

Mr. WALDIE. I want to know who can request it. That is really my essential question, and how do we make certain that access is very, very limited? Are there any standards governing those that might have access to these files, and, if so, where are those standards set forth?

Mr. O'DONNELL. Well, it comes in various forms. I think the thrust of your question is toward those non-Department of Defense agencies.

Mr. WALDIE. It is with respect to everybody. I assume there is a regulation that sets forth access to these files.

Mr. COOKE. We have furnished a DIS Regulation 20-12, entitled "Release of Investigative Information."

Mr. WALDIE. Yes. Is this Department of Defense only?

Mr. COOKE. Yes, as a matter of fact, this is a Defense Investigative Service regulation.

Mr. WALDIE. Do other executive agencies have a similar standard?

Mr. COOKE. I do not know.

Mr. WALDIE. Well, I will ask the Civil Service Commission. Now this then would give me the answers to all questions that I might have as to whom would have access to personnel records.

Mr. COOKE. Under the control of DIS, this gives you the answers to how DIS or who DIS can release these records to. Does this State know a request is levied upon the DIS internal to the Department of Defense, Mr. O'Donnell?

Mr. O'DONNELL. Yes. The procedures are set forth there.

Mr. WALDIE. I am just browsing through this. Page 16, headquarters, DIS, personnel authorized to release information. You may release copies of reports of investigations and information in all files to executive agencies, and that is before I go into the exceptions.

Does that mean that all executive branch agencies have access to these files?

Mr. COOKE. Mr. Chairman, this relates to agencies external to the Department of Defense who, because they are conducting personnel security programs under Executive Order 10450 may request information available in the DIS files.

Now what it says to all executive branch agencies, that is not true as to executive branch agencies who are conducting personnel security investigations under Executive Order 10450.

DIS reviews the accreditation of these other executive agencies and departments annually. At the present time on their accredited list I believe there are some 22 or 24 agencies or executive departments, and we will be very pleased to furnish a list of those departments for the record.

Mr. COOKE. When such information is released, it is not merely a matter of a request, it is a request coupled with a justification why they need it, and the normal reason is that the individual has had prior military service or he is being transferred from the Department

of Defense—the Department of Commerce to the Department of State, or wherever.

Mr. WALDIE. With respect to that, you are most sensitive concerning important persons, in releasing information about important persons. For example, Sub 5, you may release all copies of reports of investigations and information in all files except unfavorable information concerning important persons, public personages influential in government, public affairs, groups of national importance and interest, and persons whose present or past positions of reputation provide them special status, elected officials of the Federal Government and key elected officials of State governments, and Federal appointees, congressional persons who have occupied key positions in government, including the Department of Defense, civilian employees in the Department of Defense, GS-15 and above.

Colonels and captains or higher, other individuals designated as important persons by headquarters officials who are authorized to release Defense Investigative Service investigative information.

Why are you so sensitive about those folks?

Mr. COOKE. Mr. Chairman, I don't think that this, and I presume to speak for Mr. O'Donnell, that this regulation does not say such information will not be released. This regulation goes as to who is authorized to release it. I notice DOT-960, which is a subordinate, and if it involves these, it requires his scrutiny.

Why should these people be afforded much more protection in terms of their privacy than it afford the rest, doesn't it?

Mr. WALDIE. No; it says one senior.

Obviously, someone senior is to make sure these persons are not embarrassed, right? The idea is to protect them from being embarrassed, isn't it?

Well, I mean, come on, isn't it?

Mr. COOKE. I think embarrassed, I would not use the word "embarrassed."

Mr. WALDIE. What would you use?

Mr. COOKE. The request of release of information is always a judgment factor.

Mr. WALDIE. Why does a judgment for these people have to be made by a senior person, but for persons of lesser stature, inferior judgmental decisions are tolerated?

Mr. O'DONNELL. I think the answer is really that we feel that if someone of stature is involved, that someone senior in the staff should be aware of the fact that this information is going out.

Mr. WALDIE. Why?

Mr. O'DONNELL. For self-interest of the organization.

Mr. WALDIE. What is the self-interest?

Mr. O'DONNELL. In the event you get recontacted involving this person.

Mr. WALDIE. Actually, it is because you don't want to put out information on this person. That is actually correct, isn't that correct?

Mr. O'DONNELL. I would daresay that applies to everybody.

Mr. WALDIE. I would daresay it should, but you have different standards applying to these people. It is a different standard, isn't it, a higher standard, isn't it?

Mr. O'DONNELL. No, it is to require senior staff to be aware that the information is going out on these people.

Mr. WALDIE. Why is that?

Mr. O'DONNELL. This is because there is further contact, a telephone call.

Mr. WALDIE. Why should senior staff be aware that there has been a request that information in a captain's file be provided an agency? What is the purpose for that? Because the captain might raise hell somewhere along the line?

Mr. O'DONNELL. It is just something that is rather historically going on.

Mr. WALDIE. You have set the standard protecting the privacy of important people. You use the very words "unfavorable information concerning important persons." And the standard you set forth releasing that information is a much tougher standard to satisfy than the standard to release information concerning those persons who are not important, and by definition, that is everyone who does not fit within those areas.

Mr. COOKE. I do not see any standard, Mr. Chairman.

Mr. O'DONNELL. There is no difference in standard.

Mr. COOKE. I do not see why you draw the inference that there are different standards. I see a different level of authorization. It may be that the authority of DIS 960 is—that he is junior in rank and so forth to the people listed here, where the more senior officials in DIS are equivalent or higher rank. But I do not see any difference required in section 33 as to a different standard whatsoever.

Mr. WALDIE. Well, you permit them to release favorable information without going through this different approach. It is only unfavorable information concerning this important person that is required.

Mr. COOKE. That is true.

Mr. WALDIE. Isn't that a different standard? Is that not a different standard? Is that not a higher standard set? If it is favorable information, it is handled in the normal channels? If it is unfavorable information, it is not?

Mr. COOKE. Because there is no need for a judgment of a more senior official.

Mr. WALDIE. Why not require that judgment for favorable information?

Mr. COOKE. I think the obvious answer is that favorable information has no possible adverse effect.

Mr. WALDIE. Precisely, and that is what we are worried about with respect to these files, the unfavorable information. That is the core of this whole inquiry, the unfavorable information in those files that can be abused, and you have given me confirmation of your own belief that it can be abused because when you are dealing with unfavorable information for important persons, you set up a different procedure by which that information is to be released, and that just is not probable. You have been seeking to say something?

Mr. LIEBLING. No.

Mr. COOKE. Let me say again that should this unfavorable information be used against any individual in the nature of adverse action, let me emphasize again that that individual has a right to—has by our regulations—has a procedure of due process to the right to know, hearing, counsel, and so forth.

Mr. WALDIE. What is DO-500 or 600?

Mr. O'DONNELL. These are operational designations. One is—the 500 designates the special investigations center, which handle the more complex adverse type cases. And 600 is the personnel investigations control center, which handles the more routine matters.

Mr. WALDIE. Why would you have unfavorable information in your DIS files dealing with elected officials of State governments?

Mr. COOKE. I think the only possibility is prior service, military, or, as a civilian employee.

Mr. WALDIE. That would be the only way you would ever obtain that.

Mr. COOKE. Yes, DOD directive 5200.27 prohibits investigations of elected officials.

Mr. WALDIE. What do you mean that it expressly “prohibits”? Why would you ever investigate an elected official?

Mr. COOKE. We would not.

Mr. WALDIE. Why would you have to be prohibited?

Mr. COOKE. Mr. Chairman, 5200.27 goes back to signal improvements in our whole investigative process instituted by Secretary Laird, which grew out of the situation existing in the middle and late 1960's, where there were allegations that incident to civil disturbance responsibilities that we, particularly the Army, had accumulated a number of files on people not in any way affiliated with the Department of Defense, and we just simply wanted to spell out precisely the prohibitions, and we have made, and there are flat policy prohibitions, as I indicated, since the institution of the defense investigative program in this area.

Mr. WALDIE. You do not investigate anybody, do you, that is not an applicant for employment, or already an employee?

Mr. COOKE. We do not investigate anyone who is not an applicant for employment, or already an employee, or Defense contractor personnel and military personnel.

Mr. WALDIE. And legally, you have never been permitted to do it, have you?

Mr. COOKE. No. Legally is an interesting question. I will say there has been no statutory—

Mr. WALDIE. Prohibition?

Mr. COOKE. No statutory authorization, I was going to say, for that in the past.

Mr. WALDIE. That would seem, therefore, to make it illegal if you are not authorized, would it not?

Mr. COOKE. Yes. Now, of course, included in those affiliated are reserves. National Guard. So, it is conceivable that we would have a State legislator who is also a lieutenant colonel in the Army Reserve.

Mr. WALDIE. Would you be able to provide me with the regulation or policy statement wherein it is stated that no elected official can be investigated?

Mr. COOKE. We will be pleased to furnish you with a copy of our governing directorate on that, 5200.27.

Mr. WALDIE. Counsel, do you have more questions?

Mr. GWINN. Yes. Continuing the discussion on access, you mentioned in your statement that the commander, or commanders, had access to an employee's or an applicant's investigative file. Is this an accurate restatement of what you said?

Mr. COOKE. Access for the limited purpose—we split the responsibility for investigations, which reside in DIS now from the process, the judgment that on the basis of the investigation access to classified information should be granted, or in the case of an applicant, he qualifies under the standards of Executive Order 10450 for a critical or sensitive position. That judgment is made by the commander of the organization.

Mr. GWINN. Who is the commander, or a commander you are referring to?

Mr. COOKE. At what level of command?

Mr. O'DONNELL. Well, the request emanates with the commander. In actuality, the routine of handling it is by the security office.

Mr. GWINN. Who is the "commander"? This is a meaningless term to me.

Mr. O'DONNELL. A military organization, the commander——

Mr. GWINN. At what level do you become a commander? Is this a captain of a company?

Mr. O'DONNELL. It varies within the three services. A commander of any vessel in the Navy is a commander. A commander of an Air Force base is the commander for the purpose of this.

Mr. GWINN. So, it is not any one type of official?

Mr. O'DONNELL. No. It would be hard to categorize. They vary, but there are commanders of varying elements.

Mr. GWINN. So, a commander, who has responsibility for civilian employees, who passes on the promotion of an employee——

Mr. O'DONNELL. This would be unrelated.

Mr. GWINN. Is it only the military official that you are referring to?

Mr. O'DONNELL. Concerned with the access of the individual to classified Defense information, not concerned as far as these files are concerned with the promotion of the person, his receiving awards, or even the discharge. These are not personnel files.

Mr. COOKE. These files are not used on qualifications for promotion.

Mr. GWINN. But a commander in this sense is a military official?

Mr. COOKE. Not necessarily, not necessarily at all.

Mr. GWINN. Who is it, other than military?

Mr. COOKE. Well, in the case of the Office of the Secretary of Defense, there is no military official. What we are talking about is the official authorized to make these judgments.

Mr. GWINN. In any office of the Department of Defense, or in the services?

Mr. COOKE. Well, it depends upon, as Mr. O'Donnell said, it is difficult to categorize, and it depends upon the echelon concerned.

Mr. GWINN. According to your statement, then, the commander has access to the files, and this access would be granted to essentially any authorized head of an office?

Mr. COOKE. Of an activity. We are not talking about a commander.

Mr. O'DONNELL. Again, it is an extremely complex situation as to what commander you are talking about. Within the Army, there are different criteria as to who commands.

Mr. GWINN. My point is that this covers virtually everyone in authority.

Mr. O'DONNELL. No.

Mr. GWINN. Who is left out? Can you provide us with that information, if not now?

Mr. O'DONNELL. We will make a stab at giving you a better definition of the level of request, which is really what we are talking about here.

[The information follows:]

Question. Define and/or explain the term "Commander" as it pertains to those authorized to request investigations and receive investigative files.

Reply. The term "Commander" is used in a very broad DoD-wide sense, as referring to anyone who is responsible for security clearance actions incident to his responsibilities for the integrity of the agency, component, unit, or other organizational element. The term is utilized in the following context: In October 1972, the Defense Investigative Service (DIS) assumed Personnel Security Investigations (PSI) functions formerly provided by the military service investigative agencies. These functions include the control of all PSIs for Department of Defense components, operation of the Defense Central Index of Investigations and the providing of DIS investigative file information to authorized requesters. Pending publication of a DoD Directive relative to the safeguarding and release of investigative information, DIS has continued to follow the procedures used by the Military Departments in accepting requests for investigation and authorizing and providing file and index information to DoD agencies and military commanders. The Department of the Army provides an account identification number for each of its accredited subordinate elements, and DIS uses these numbers (approximately 600 separate accounts) to identify authorized Army commanders. Within the Department of the Air Force, the base Chief of Security Police of each Air Force installation and major command is an authorized requester. All subordinate Navy commanders, listed in the Standard Navy Distribution List, are considered commanders within this context. Likewise, each DoD agency, e.g., Defense Mapping Agency, Defense Intelligence Agency, Defense Industrial Security Clearance Office, etc., is considered and authorized requester of DIS investigations and file information.

Mr. GWINN. The requester has access to the files of military personnel or employees under his authority?

Mr. COOKE. Access for the limited person with respect to access to classified information.

Mr. GWINN. I know the purpose for which he requests access to the files, but nevertheless he sees the files, and obviously he does not erase his memory on passing back the file. I am sure you would not say that if he sees something in the file which may reflect on the character of the employee, that it does not have an adverse effect?

Mr. COOKE. We will elaborate. Again, it is not the actual file, as Mr. O'Donnell said earlier. It is a report.

Mr. GWINN. Of the information in the file?

Mr. COOKE. Yes.

Mr. GWINN. Earlier you mentioned, that any individual seeking access had to have an express need to know.

Mr. COOKE. Yes.

Mr. GWINN. But you are not saying that a person, an individual with this need to know, or supervisor, could not actually have this need to know, or a need to have access to the files?

Mr. COOKE. I think what we are saying is two things. He must be at the echelon, and as Mr. O'Donnell says, that varies in the department that can make such request, and in addition he must have the need to know, the distinction being that someone who is not a requester may concede that he has a need to know, but unless he qualifies, he does not get the information.

Mr. GWINN. But there are individuals with a need to know who are also in a position, not necessarily at the same time, but are also in a position of passing upon an employee's promotion, demotion, reassignment.

Mr. COOKE. I think it is possible, but not as a general proposition that promotion, and so forth—

Mr. GWINN. I understand that is not the intent of the regulations, but this is possible.

Mr. COOKE. Possible, yes, widespread, no.

Mr. GWINN. In your statement on page 4, getting back to the background investigations briefly, you state that the purpose of the background investigation, and again I am reading, "is to obtain full facts about the background," yet you say the background investigations are limited to obtaining the information which must be known in order to make a determination of the individual's fitness for employment.

How can you say that it is both limited and yet your investigation is conducted to obtain the full facts?

I am wondering how you can, in fact, say that an investigation encompasses inquiry as to character, habits, morals, reputation, association, and how that can in any sense be limited?

Mr. COOKE. As I indicated, we are not Johnny-come-latelys to try to balance the legitimate need of government and our concern for the rights, the private rights of the individual, and I would like to furnish you—this document is 12 years old, but it speaks eloquently. It was promulgated through the military departments by Mr. Lieb-ling's predecessor. It states in essence that it is necessary that investigators and members of the Security Review Board have a keen and well-developed awareness, and so forth. As part of the memorandum, it lays out in quite specific detail types of questions regarded as improper, or irrelevant in security investigations and adjudications, and covers religious matters, racial matters, personal and domestic matters, political matters and the like. The reason being that on the basis of our experience, these are completely unrelated on the determination of suitability or to the determination of access to classified information. It is very difficult to draw a precise line. We are doing our best, and I would like to furnish this as a demonstration of our longstanding concern. As you said, this is nothing new. We have been working at this problem for some time.

[The information follows:]

NOVEMBER 26, 1962.

MEMORANDUM FOR THE UNDER SECRETARY OF THE ARMY, THE UNDER SECRETARY OF THE NAVY, AND THE UNDER SECRETARY OF THE AIR FORCE

Subject: Civil and Private Rights

In order to insure that inquiries and interrogations conducted in the course of security investigations and adjudicative proceedings do not violate lawful civil and private rights, or discourage lawful political activity in any of its forms, or intimidate free expression or thought, it is necessary that investigators and members of security review boards have a keen and well developed awareness of and respect for the rights of the subjects of inquiries and of other persons from whom information is sought. Initially, this is a matter of proper indoctrination and training, and subsequently a matter of careful guidance and supervision. The civil and private rights of both the subjects of inquiries as well as of others to whom inquiries are addressed deserve equal concern and consideration on the part of Department of Defense personnel.

It is recognized that the Military Departments of necessity should learn a great deal about a person before a proper determination can be made with respect to entrusting him with classified defense information or placing him in an otherwise sensitive position. This applies to civilian employees of the Department, members of the Armed Forces, and employees of the defense con-

tractors. In making inquiries upon which security decisions are based, the Department of Defense usually enjoys the cooperation of all persons who reasonably may be expected to possess information bearing upon the reliability and trustworthiness of the subjects of such inquiries. This cooperation is based, we believe, in a large part upon the American public's understanding of the Government's purpose and interest in making the inquiries. Questions which are irrelevant or inconsistent with established testimonial privileges or constitutional considerations serve only to detract from the effectiveness of the security program of the Department of Defense.

Persons conducting security investigations and inquiries normally have broad latitude in performing these essential and vital functions. This places a high premium upon the exercise of good judgment and common sense. While it is virtually impossible to establish elaborate rules which will provide satisfactory guidance in all circumstances, there are certain basic principles which have general application.

Care must be taken not to inject improper matters into security inquiries whether in the course of security investigations or other phases of security proceedings. For example, religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies, and affiliation with labor unions are not proper subjects for such inquiries.

Inquiries which have no relevance to a security determination should not be made. Questions regarding personal and domestic affairs, financial matters, and the status of physical health, fall in this category unless evidence clearly indicates a reasonable basis for believing there may be illegal or subversive activities, personal or moral irresponsibility, or mental or emotional instability involved. The probing of a person's thoughts or beliefs and questions about his conduct, which have no security implications, are unwarranted. Department of Defense representatives always should be prepared to explain the relevance of their inquiries upon request. Adverse inferences cannot properly be drawn from the refusal of a person to answer questions the relevance of which has not been established.

It is requested that your Department review its applicable regulations and instructions, and those portions of its training and refresher courses for investigators and adjudicators, which deal with civil rights and individual private rights, to determine the propriety of their content. We would appreciate receiving within thirty days a description of the steps your Department may have taken in this area. Inasmuch as it is contemplated that the attached list of prohibited questions may be incorporated in a DoD Directive, your comments with respect to them would be appreciated. Any suggestions you may wish to offer along these general lines would be welcome.

WALTER T. SKALLERUP, Jr.
Deputy Assistant Secretary of Defense
Security Policy.

Attachment a/s.

TYPES OF QUESTIONS REGARDED AS IMPROPER OR IRRELEVANT IN SECURITY INVESTIGATIONS AND ADJUDICATIONS WHETHER DIRECTED TO THE SUBJECT OR ANOTHER INDIVIDUAL

A. Religious Matters

1. Do you believe in God?
2. What is your religious preference or affiliation?
3. Are you anti-Semitic, Anti-Catholic, or Anti-Protestant?
4. Are you an atheist or an agnostic?
5. Do you believe in the doctrine of separation of church and state?

B. Racial Matters

1. What are your views on racial matters such as desegregation of public schools, hotels, eating places, etc?
2. Are you a member of NAACP or CORE?
3. Do you entertain members of other races in your home?
4. What are your views on racial intermarriage?
5. Do you believe one race is superior to another?

C. Personal and Domestic Matters

1. How much income tax do you pay?
2. What is the source and size of your income?
3. What is your net worth?
4. What contributions do you make to political, charitable, religious or civic organizations?
5. Describe any physical ailments or diseases you may have.
6. Do you have any serious marital or domestic problems?
7. Are you or have you been a member of a trade union?
8. Is there anything in your past life that you would not want your wife to know?

D. Political Matters

1. In political matters do you consider yourself to be a liberal or a conservative?
2. Are you registered to vote in primary elections?
3. Did you vote in the last national, state or municipal election?
4. Are you a member of a political club or party?
5. Have you ever signed a political petition? Explain?
6. Do you write your Congressman or Senator about issues in which you are interested or to obtain assistance?
7. What are your views regarding the decisions of the United States Supreme Court? (i.e., the prayer in public schools, desegregation, and Communist Party Cases.)
8. What are your views on the constitutionality of proposed or existing legislation?

Mr. GWINN. I think that is the point. There can be no line drawn, and this is really where the potential for abuse comes, if there is not, in fact, abuse which can be documented.

Furthering that line of thought, I would like to comment on one thing. I have noticed that you go on to say in this paragraph, that "Thus, inquiries into religious beliefs and affiliations, beliefs and opinions regarding racial matters, political beliefs * * *" and so forth are not proper and are specifically prohibited by DOD as a matter of policy.

My question would be directed toward the policy that political beliefs and affiliations have a nonsubversive nature. How do you determine if they are of a nonsubversive nature? Do you not have to make an investigation to find out what the political affiliations might be in order to determine whether they are nonsubversive?

Mr. COOKE. I really do not think so in the broad category at all. Certainly, as you indicated, this is a matter of judgment. A political belief of a subversive nature is, "Do you believe in the violent overthrow of our Government by force?"

Mr. GWINN. I know what you are looking for in this case, but my question is, How do you determine that an employee's political affiliations are nonsubversive? You are obviously stating that political beliefs of a subversive nature are a legitimate area of inquiry. Do you investigate an individual's political affiliations and beliefs in order to determine that they are nonsubversive?

Mr. O'DONNELL. It doesn't arise quite that way. The information concerning an individual as the investigation proceeds—for instance, someone in an interview might make the statement that this person was at one time involved with an organization which did preach the violent overthrow of the Government. We would, of course, solicit from the FBI information as to what that organization is, what do they know about it, and is it indeed one that preaches such a policy,

and determine to the best of our ability what role this individual played in that organization.

But we are not asking—we are not seeking without that type of information coming to the fore, we are not seeking information as to what is his political belief, to what party does he subscribe. These questions are not asked.

Mr. GWINN. Do you not seek information as to the possibility that an employee holds political beliefs that are perhaps subversive?

Mr. O'DONNELL. That line of questioning as such is not pursued. But this does not prevent the volunteering of information on record checks, which would indicate there was such information.

Mr. GWINN. What level of investigation would you then conduct on information volunteered in this manner?

You have already said you would go to the FBI and seek information on the kind of organization this was. Would you investigate other political affiliations, or memberships in other political organizations?

Mr. O'DONNELL. No, not unless there was some reason to explore it.

Mr. GWINN. What would be a reason?

Mr. O'DONNELL. That there are other organizations, other groups, to which this person affiliated himself, and that information also became available.

But the pursuit of the political beliefs of the person, per se, is not part of the investigation.

Mr. COOKE. Let me add to that.

Again, I referred to the memo we are providing for the record. These are not questions that are specifically provided as improper. In political matters, do you consider yourself to be a liberal or conservative? Are you registered to vote in primary elections? Did you vote in the last national, State, and municipal elections? Are you a member of a political party? What party? What club? Have you ever signed a political petition? Explain.

These are expressly prohibited.

On the other hand, as Mr. O'Donnell suggested, if we had information, and we are primarily in the background investigation area, that—to take a recent example, an individual alleged to be a member of the Symbionese Army. We would obviously ask questions about that.

Mr. WALDIE. May I interrupt here?

I notice on your summary of your regulation of materials, on page 7, item 10, you refer to organizations and offices not in the U.S. Government structure, and then it describes how you handle those requests for investigative information received from a private organization or a business firm or individual.

When would you ever provide access to these files to a private organization or a business firm or individual?

Mr. COOKE. We would not provide access to investigative information. However—

Mr. WALDIE. Why do you have a manner of handling requests for investigative information?

Mr. COOKE. I think primarily there may be some matters of information in the file which come under the provisions of the Freedom of Information Act and DOD Directive 5400.7, if my memory serves me correctly, is to implement the Freedom of Information Act, and they are not suppliers themselves, which is included under one of the eight exceptions.

But there may be pieces of information in the DIS files which, like it or not, under the Freedom of Information Act, we have to, we feel, which may conceivably have to be furnished.

Mr. WALDIE. Is that the only area?

Mr. COOKE. Yes, in which we would ever consider a private organization, yes.

Mr. WALDIE. Is that right, Mr. Liebling?

Mr. LIEBLING. Yes.

Mr. WALDIE. Is that what 5200.27 deals with?

Mr. LIEBLING. The Freedom of Information Act, yes.

Mr. COOKE. The right of privacy and the right of access to public information sort of go like this [indicating], and I know your committee, among others, have been wrestling with the potential conflict in that, as we have, sir.

Mr. WALDIE. I see. So the private organization, business firm or individual, would deal solely with that.

Mr. COOKE. We are not talking about the release of the investigative files, but there may be information in those files that qualifies for release under Freedom of Information.

Mr. WALDIE. OK.

Bruce, do you want to ask more questions?

Mr. GWINN. Just one final question.

One thing the subcommittee has great concern about is the oversight function of the Civil Service Commission with regard to personnel investigations by the agencies.

One thing that more or less stood out in looking at the personnel investigations that the Defense Department conducts is the fact that the Director of the Defense Investigative Services, General Capucci, is an active member of the military.

I realize that the Civil Service Commission delegates to the head of the agency the authority to conduct or establish security programs—

Mr. COOKE. As a matter of fact, it is not the Civil Service Commission. It is Executive Order 10450 which specifically makes each department head responsible for the security programs within his department.

Mr. GWINN. If I am not mistaken, the Commission is given responsibility for approving the programs; is this correct?

Approve may be the wrong word.

Mr. COOKE. I answered that in questions 12 and 13 we submitted for the record. I will be glad to go over them again, but essentially, section 14(a) makes—of Executive Order 10450, makes the Commission responsible for overseeing the implementation of the Executive order in conjunction with the departments and agencies concerned.

It also provides that should the Commission feel that the executive department is not properly implementing the order, and informed negotiation fails to resolve the issue, the Commission is authorized to report the matter to the National Security Council.

The Commission has looked over our program. I think they are in the process of the fourth time since the establishment of the Executive order. They have never found it necessary or desirable to go to the National Security Council on that.

So, yes, we are examined, and our programs are reviewed by the Civil Service Commission, and we have had differences of programs that we have worked out.

Mr. O'DONNELL. The Commission is visiting us shortly. This month. A date has been set for their review—which includes not only a review of our policies and procedures—but in keeping with their responsibilities, a review of the actual investigative files, a sampling of them to see that we are doing what we say we are doing.

Mr. GWINN. If they found something to which they objected in the way you are conducting personnel investigations, what would be their authority, or what powers of sanction would they have?

Mr. COOKE. As I interpret the Executive order, they have no power of sanction other than to—assuming that it can't be worked out informally, and I emphasize our differences to date have been worked out informally—than to raise the issue to the level of the National Security Council under provision 14 of the Executive order.

Mr. GWINN. You are saying they have essentially no authority to direct you to change your policies with regard to personnel investigations, other than to take their disagreements to the National Security Council.

That would force the Commission to work out with you in all cases some resolution of the disagreement. It is essentially not a viable alternative.

Mr. COOKE. I don't want to suggest that our policies are at variance with the policies established by the Civil Service Commission because that is not true.

Mr. GWINN. What if it were?

Mr. COOKE. That is a hypothetical question.

Mr. GWINN. It is a hypothetical question, yes.

Mr. COOKE. It is one that has not arisen, but under our interpretation of the Executive order, the Civil Service Commission has no authority under that order to direct in that sense.

Mr. GWINN. And in the sense that the Director of the Defense Investigative Service is military, they have no authority to discuss the issue, do they?

Would not any recommendation have to go through the Office of the Secretary of Defense?

Mr. COOKE. Our discussions and the differences we have had, and the differences have been with regard to scope, how many neighborhood investigations do you conduct, and the discussions are with Mr. Liebling, the Deputy Assistant Secretary for Security Policy, because the basic policies as to what you do, and what you do not do, are not for the Defense Investigative Service to establish at all. They are the operating arm of the basic policies, coming from the Secretary of Defense or his designee who in this case happens to be Mr. Liebling.

Mr. GWINN. Thank you.

Mr. WALDIE. I know you have again on page 13 of the DIS-20 a provision for reporting income tax information so that when you send a report or letter outside of DIS channels, which contains income tax information obtained without the taxpayer's consent, you must attach a statement of the law.

When would you have such information in your investigative folder?

Mr. O'DONNELL. As a matter of fact, we never have had; but, again, as you recall, we are not quite 2 years old yet, and a lot of the procedural policies that we have set forth in our directives are historic. They were picked up from the manuals of the three investigative services involved. Therefore, this is kind of a moot point.

It is there, but we have never had occasion to exercise it, since October of 1972.

Mr. WALDIE. Would you have the right in an inquiry, in an investigation pursuant to any of these personnel matters, to obtain income tax information without the taxpayer's consent?

Mr. O'DONNELL. We would ask the intelligence bureau of the IRS, and I am dealing with this hypothetically, as you are, and I could be wrong in stating a procedure that comes to mind that would probably operate.

We would ask the intelligence bureau of the IRS if they have information which is pertinent to our interest in the individual. Whatever they, according to their rules and regulations, were permitted to release to us we would report with this restrictive legend attached to it.

Mr. WALDIE. Would that be obtained pursuant to that code section?

Mr. COOKE. Mr. Chairman, I can't conceive in a personnel or suitability investigation where this would be inquiring with respect to the income tax regulations.

The question as to "How much income tax do you pay, what is the size of your income, what contributions do you make," are expressly beyond the pale.

Mr. WALDIE. But we legislate against the chances. It is the authority that brings about the abuse, though it is rarely exercised, and everyone agrees it never should be exercised. If the authority is there, there is an invitation to exercise it.

The question I am asking you is: Do you have the right in compiling an investigative report to obtain tax information without the taxpayer's consent?

Mr. O'DONNELL. I don't believe it applies to the investigations we are—

Mr. WALDIE. Rather than speculating, will you provide me with the legal response? Either you do or you do not. And you should not have, in my own personal view; and I don't see why you should have this statement in your procedures. It leads me to believe you must have the authority.

Mr. COOKE. We will be pleased to furnish the information.

[The information follows:]

Question. Does DIS have the authority to obtain IRS records? If so, what is the authority, and when would it be used?

Reply. The Director, DIS, (and other Federal Executive Department Agency Heads) has the authority to request that the Commissioner of Internal Revenue permit inspection of tax returns in connection with some matter officially before the requesting agency. This authority is contained in Section 301.6103(a)—If, Title 26, Code of Federal Regulations. The above Code provision requires that such requests for inspection set forth (1) the name and address of the person for whom the return was made, (2) the kind of tax reported on the return, (3) the taxable period covered by the return, (4) the reason why inspection is required and (5) the name and the official designation of the person by whom the inspection is to be made. Inspection may then be granted at the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue. While DIS Regulation 20-12 sets forth the requirement for protection of such information if it is obtained, DIS has not as yet had any occasion when it was considered necessary to utilize the authority that is available. Paragraph 26 was placed in DIS Regulation 20-12 as a result of the consolidation and collation of all restrictive legends used by the investigative agencies for which DIS was created, and to serve as a guide should such information ever be required in a DIS investigation.

Mr. COOKE. I don't know what the authority may be. This presumably came up because the service investigative agencies had an investigative responsibility beyond the personnel security.

Mr. WALDIE. Just in conclusion, so our record will be complete, let me tell you my own view, and I would like a statement from you.

I think you in fact are setting up a different standard for release of derogatory information when important persons, to use your term, are involved.

I have established the concern that the subcommittee experiences that there is a danger that derogatory information can be abused.

You have sought to limit that danger by setting up a higher standard involving important persons. I think that standard should have equal application to all people.

There ought not to be that language, even, in your regulations.

I am enormously concerned that an important person's confidential records will be better protected than an unimportant person, and that is not acceptable.

I gather you do not believe that is the standard set forth. Therefore, to make the record, I would like your explanation of why there is language involving the handling of information that involves important persons, and why that is handled differently than the rest of the people in those files.

Mr. COOKE. Mr. Chairman, I would be pleased to furnish that for the record. I want to phrase my answer carefully, recognizing the committee's concern.

Mr. WALDIE. That is why I asked it now rather than our colloquy. [The information follows:]

Question. With regard to paragraph 33 of DIS Regulation 20-12, why are files pertaining to certain categories of people (VIPs) reviewed at a higher level within DIS prior to release?

Reply. Paragraph 33 of DIS Regulation 20-12 provides for a higher level of review for release of unfavorable information concerning "important persons" than for the ordinary individual not only because of the position the VIP occupies but also because of the high level requester normally involved. Such a requester will, if questions arise, invariably address his concern or interest to similar levels in DIS. The prescribed procedure, then, serves to pre-inform senior DIS personnel of situations that might be expected to arise. While DIS is intensely concerned about the protection of the reputation of all persons it investigates, it must also take into consideration the damage which might be done to a VIP as compared to other individuals. This "double standard" does not apply to criteria used in releases—this is the same for all persons, VIP or not. The provisions of paragraph 33 are not intended to give special treatment for the senior individual, but, rather to address the requirements indicated above.

Mr. WALDIE. Thank you, gentlemen. Thank you very much.

The next witness will be Mr. Robert Drummond, Director of the Bureau of Personnel Investigations, U.S. Civil Service Commission.

**STATEMENT OF ROBERT J. DRUMMOND, DIRECTOR, BUREAU OF
PERSONNEL INVESTIGATIONS, U.S. CIVIL SERVICE COMMISSION,
ACCOMPANIED BY ANTHONY MONDELLO, GENERAL COUNSEL**

Mr. DRUMMOND. Mr. Chairman, I appreciate the opportunity to respond to your invitation of July 17 to appear before your subcommittee for the purpose of testifying regarding the responsibilities and policies of the Civil Service Commission in relation to personnel in-

vestigations. Mr. Anthony Mondello, General Counsel of the Commission, is here with me to assist in our presentation.

During the early part of July my staff and I met with members of your staff to provide a background briefing on the policies and operations of the Commission's investigations program. Our discussions formed the basis for a series of further questions posed in your letter of July 10, 1974. Our detailed responses were given in my letter of August 2.

We trust you have found our answers helpful in your study. Mr. Mondello and I will be pleased to answer any questions you may wish to ask.

Mr. WALDIE. I just want to ask a question or two relating to the Department of Defense matter. With respect to the regulation that I was concerned about involving important persons investigated, were you aware of that, No. 1?

Mr. DRUMMOND. Was I aware of that particular regulation of the Department of Defense? No, sir; not until I saw this here.

Mr. WALDIE. Do you have a similar manner in treating important persons' files compared to other people?

Mr. DRUMMOND. No; our investigative files, we release them to people who have a need to know, who have credentials.

Mr. WALDIE. No, no; that is not what I am saying. Do you have any regulations or any directions that files of the certain described individuals, whether you characterize them as important persons or not, are to be treated differently than other files?

Mr. DRUMMOND. No; not to be treated differently than any other files, sir, I think I should say this, that there is one file that the Civil Service Commission maintains, and it is a security file which has come under question in the past, and in which the Commission has put out information with respect to in response to these questions.

Now this file could contain the names of people at some time who get elected to public office, and when this is done, these names are pulled out of the file and maintained under the control of the chief of that division, but they are not treated any differently other than that.

It is just so the people will not have ready access to that.

Mr. WALDIE. Well, of course, that is what it is all about, isn't it? That is what we are all about here. We want to deny ready access to this information and thereby protect privacy. You put your finger right on the words that we are seeking to implement statutorily, because we are concerned that ready access is all too present in these files, and I gather the Department of Defense concurs, because ready access is circumscribed for important persons, and you have apparently set up a different category so that ready access to elected officials' files is not as easily obtained.

Mr. DRUMMOND. These are not investigative files, sir.

Mr. WALDIE. What files are they?

Mr. DRUMMOND. They are essentially lead files.

Mr. WALDIE. What is a security file, and what is the Civil Service Commission doing keeping security files?

Now what is a lead file?

Mr. DRUMMOND. Over the years, sir, it has been built up within the Commission in the course of conducting investigations. The file could contain information from publications, newspapers.

Mr. WALDIE. What kind of information?

Mr. DRUMMOND. Mainly it was built up during the years in the 1940's and 1950's when loyalty was at issue and it was essential to have a body of leads information about alleged disloyalty or subversive activities on the part of individuals and organizations. The file also is built up from information gathered from other sources where records have been checked.

Mr. WALDIE. Under what authority are these security files accumulated? What statutory authority?

Mr. DRUMMOND. There is no specific authority for the files, sir, but in the course of doing business, doing business in the field of investigation, then there is, as a good business practice, a need to maintain information collected from whatever source which may be a possible lead.

Mr. WALDIE. That is just exactly why we are so concerned about this file, because there is apparently no limitation on those who are gathering the information. As you say, once you are in the business of investigating, you gather everything you can get together and stack it away somewhere. How many of these files do you have, security files?

Mr. DRUMMOND. In that file, sir, and if I am wrong I will correct the record, but I would say there are about 2,000—rather, 2 million names in this file.

Mr. WALDIE. Is that a continuing process? Are you still keeping that security file?

Mr. DRUMMOND. We still maintain it; yes, sir.

Mr. WALDIE. And you keep putting information in that that you believe is relevant to a person's loyalty or lack of loyalty?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. And that is essentially clippings from publications?

Mr. DRUMMOND. It could be information with respect to hearings, hearings going back to the House Committee on Un-American Activities. Essentially it is a name file. It is not, sir, an investigations file. In other words, it is not a report of investigations file.

Mr. WALDIE. So it isn't very important, that is your point?

Mr. DRUMMOND. No. My point is, sir, that I was trying to be completely candid and truthful in response to the question which was raised by the regulations that the Department of Defense has. We have no such regulations in terms of release of our reports of investigations, and we don't distinguish between derogatory information or clear information. If an individual has a need to know and is on a legitimate mission, we will release a report of personnel investigation to him.

It does not make any difference whether it is on a grade 15, 16, 18, or a grade 2.

Mr. WALDIE. In keeping this security file, you work with the House Internal Security Committee and their security file, too? You have an interchange, do you not?

Mr. DRUMMOND. We have been searching the House Committee on Internal Security files over the years, yes, sir.

Mr. WALDIE. But you yourself accumulate information independent of them, too?

Mr. DRUMMOND. Yes, published hearings. We don't go and ask them to help us set up a file if that is what you mean.

Mr. WALDIE. Do you provide them with the information from your files?

Mr. DRUMMOND. I am not sure, sir. It is possible that we have over the years, but to my knowledge, we don't supply them with information from our files.

Mr. WALDIE. Whom do you supply with information from the security files?

Mr. DRUMMOND. We merely check the security file for each investigation that we start to see, No. 1, if there is a record, any type of information with respect to the name that we have under investigation.

Then, if there is a name like that before any information is released, we check to see if the individual is one and the same.

Mr. WALDIE. Why do you take elected officials' names out?

Mr. DRUMMOND. Why do we take them out, sir?

Mr. WALDIE. Yes.

Mr. DRUMMOND. In order that they would not indiscriminately be released by somebody.

No. 1, it shouldn't even appear in any report of investigation, this information we may have had.

Mr. WALDIE. Wait a minute.

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. There is no possibility, is there, of that information being indiscriminately released from those files?

Mr. DRUMMOND. There shouldn't be, sir.

Mr. WALDIE. Well, there isn't, is there?

Mr. DRUMMOND. Well, let's say we afford a greater protection to the possibility, or potential for it to be indiscriminately released.

Mr. WALDIE. Why should elected officials be better protected in that regard than a citizen of the United States?

Mr. MONDELLO. May I suggest a possible response?

I have been unacquainted with this procedure.

Mr. WALDIE. You have what, Mr. Mondello?

Mr. MONDELLO. This is the first I have heard of the procedure of taking elected officials' names from this file.

There is, I suppose, a greater potential to do damage to a person who is in the public eye, so to speak, by inadvertent disclosure, than there would be to the ordinary person like myself.

Mr. WALDIE. Why would that be so?

Mr. MONDELLO. I beg your pardon?

Mr. WALDIE. If you are damaged by false information, you are damaged, aren't you? Why should I be better protected?

Mr. MONDELLO. Whoever is damaged is damaged, true.

Mr. WALDIE. Why are there two standards?

Mr. MONDELLO. I don't think there are two standards.

Mr. WALDIE. There are. You are saying I am subject to greater vulnerability to release of this information than you are? That is what you are saying, isn't it?

Mr. MONDELLO. No. As I understand what they are doing is the reason they remove some person's names from the files is to make doubly sure—

Mr. WALDIE. Isn't it a higher standard?

Mr. MONDELLO. It is a different measure of protection.

Mr. WALDIE. It is a higher measure of protection, isn't it?

Mr. WALDIE. That is a higher standard, isn't it?

Mr. MONDELLO. I don't think so, and I would like to explain that.

Mr. WALDIE. Why should any citizen have a higher standard against invasion of his privacy than any other citizen?

Mr. MONDELLO. Because of the greater likelihood that disclosure would cause damage. I think the purpose of that technique, that procedure, recognizes the fact that you can do greater damage to persons in the public eye just willy-nilly by disclosure than you can do to other persons, and I regard this as a reflection of the same kind of distinction the courts make with respect to what is fair comment about people to the extent that they are more in the public eye, and I think there is a recent decision of the Supreme Court which indicates newspapers have a greater range of permissible activity concerning such persons in commenting on what otherwise would be their relatively private affairs.

Now, the essence of the problem in terms of fairness as I see it is the same as the essence of the equal protection problem. You treat people who are similarly situated similarly, but you take account of differences in their situations, and that is why I say I don't think a different standard is being used, but there is no doubt whatever that this investigative bureau has tried to put beyond the possibility of easy dispensation information about people who could be greater damaged by the disclosure. That is all I think it is.

Mr. WALDIE. Mr. Mondello, what is the statutory authority for maintenance of security files by the Civil Service Commission?

Mr. MONDELLO. You are now talking of that security file that was just described?

Mr. WALDIE. Yes.

Mr. MONDELLO. I suppose it is in the statutory authority to conduct investigations.

Mr. WALDIE. Let's not suppose. Would you provide that in writing, the statutory authority that allows the Civil Service Commission to keep a security file with 2 million names in it?

Mr. DRUMMOND. Yes.

Mr. WALDIE. Are there other categories that receive different protection with respect to invasion of privacy than "elected officials"? Is that the only category?

Mr. DRUMMOND. No, sir, that is the only one, and I wanted to bring it to your attention, but I don't view it as a greater protection.

Mr. WALDIE. I understand.

Mr. DRUMMOND. Because I did not say that it would not be released.

Mr. WALDIE. I understand exactly how you feel, and I am not putting words in your mouth, but I want you to understand exactly how I feel, which is different from the way you feel.

That is the only category, "elected officials"? Is that right?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. Appointed officials' names remain in there?

Mr. DRUMMOND. Yes, they do, if we had any information, yes, of course.

Mr. WALDIE. That is what I am talking about. No matter how high the position in government is?

Mr. DRUMMOND. That is right.

Mr. WALDIE. Are there any written regulations involving that aspect, or is that just practice?

Mr. DRUMMOND. I don't know of any written, and the reason I brought it to your attention—

Mr. WALDIE. You brought it to my attention because I asked you the question, and you responded.

Mr. DRUMMOND. Yes, but I think we have put that out in a publication, then, and I would like to furnish you whatever it was for the record.

And in response to the question of authority, for a number of years in seeking our appropriations, we always included the name of this file, together with our other files of the security index which we maintain under Executive Order 10450 in our budget request, up until recently when we revised our whole procedure for submitting the budget. But it always had been identified in submitting our request for funds from Congress to operate the program.

So to that extent, it has had some congressional sanction in terms of recognition of the file.

Mr. WALDIE. Will you examine and report to me by letter whether or not there exists any regulations concerning access to this security file?

Mr. DRUMMOND. I will, sir.

Mr. WALDIE. And any regulations concerning materials that are placed into the security file? It simply cannot exist there solely by virtue of oral authority.

I am sure there are some standards that direct people what to put into that file, and direct people as to who may have access to it. Please provide me with those.

Mr. DRUMMOND. I will, sir.

Mr. WALDIE. Do you have questions?

Mr. GWINN. As an indication of the abuses that arise from the collection of information which the employee or person being investigated has no opportunity to challenge, we have the 1972 case of *Finley v. Hampton*. The Government employee in this case was refused the opportunity to remove from his file derogatory information that had been included there during a security investigation of the employee pursuant to an attempt to qualify for sensitive classification necessary to obtain his job.

The investigator was told that two of the employee's friends had homosexual mannerisms. The opponent was then told by the supervisor that he would be denied classification because of the inference that he was a homosexual. The employee received a certification in a job that was classified as nonsensitive and he was promoted in it several times.

But an attempt to have the derogatory material removed was denied.

Judge Wright in his dissenting opinion stated that the only reason the agency would want to keep, as he referred to it, "this silly statement," was to use it against the appellant if he ever applied for a position requiring a security clearance.

I think there was abuse in this case where the employee was unable to remove from the file unsubstantiated information which others had access to, whether or not it was access for the purpose of initiating an adverse motion.

His reputation, and his frequent associations could be adversely affected, and it is, I think, the concern of the chairman in this regard that information of this sort is in no way related to an employee's

job performance or has any relationship to his ability to perform in the Federal service.

But in this case, once the information is in the file there are reasons to seek its removal, and this is the difficulty that I think the subcommittee's attention is directed to.

Do you have a comment on the way in which an aversion of this sort could have been included in the file, and what relationship it might have on the employee's job function that two friends had homosexual mannerisms?

Mr. MONDELLO. I am acquainted with the Finley case and the decision. There is no Federal expungement statute, and we have had virtually no guidance whatever from the Congress as to whether we should or should not expunge. And we have just been doing what seems appropriate for us to do.

We had recently done a study of State expungement statutes with respect to criminal activities that are in effect excused post hoc by the States, and we are in communication with Senator Ervin's committee with respect to that at the moment. But we are going to complete that study for whatever light it sheds on what we ought to do in the Federal area with respect to this.

Beyond that, I would like to say that I think that there was an abuse of information in regard to the Finley case, if you can accept as true what the supervisor denies in that case; namely, that he did say these things to Mr. Finley.

But the problem for us is to—you know, you have to put your faith someplace. You know in the course of an investigation you are going to get all kinds of information from people you have never seen before who say whatever they say to you. It is difficult when you first hear derogatory information to know whether it will relate to something else. In connection with the *Finley* case, they were looking into whether he was of questionable morality, which is a question that I don't think the Government ought to be making judgments about. And I would like to say a word, Mr. Chairman, about that in just a moment, about those regulations that I have had occasion to tell you about before.

We have been reminded by the courts that the Civil Service Commission should not be making judgments as to morality. I believe that, and I believe it very strongly. So that at the time the *Finley* case occurred, which is now 6 or 8 years ago, there was a different flavor about it; and it was then believed widely that homosexuality was a total disqualification for any form of Government employment.

There have since been many cases in the courts about this subject, in particular the language of the *Norton* case in the District of Columbia Circuit, which suggests we are not "annointed," and as a result of this change in public attitude, the Commission has taken its own hard look at what it ought to be doing in this area. And as I told you before, Mr. Chairman, we had been reviewing a set of regulations that would have the effect of causing all persons who had to do with disqualifications to bear in mind what the limits of their Federal authority were, with respect to what we do with privacy, the private activities of people. That must be demonstrated to be related to the job, and we have so couched our regulations now that it is almost impossible for anyone to attempt to take currently into account the former judgments which used to be regarded as fair game for Government to take into account,

without making a demonstration on the record of whatever procedure is going on of the relationship between the outside conduct and the responsibilities of the job.

I think that is all to the good. It tends to put on us in Government the kind of blinders that I understand you to be talking about with regard to your concern that we leave alone the private matters of people and deal only with the things that are related to the position.

Now, there is a variety of private conduct that is regulated, and this is outside the range of the suitability regulations I am talking about, such things as political activities, or financial transactions that might give rise to a conflict-of-interest problem; but even there the Government has to put blinders on, because conflict problems are peculiar to those who ordinarily have some reach in financial terms with members of the public. So that you might worry about the financial transactions stock manipulations, or holdings of any sort, of a person who was the individual who authorized the granting of a contract to a particular private contractor, whereas you might not consider those things as relevant to the job duties of many other people in many other occupations.

So all I am trying to suggest is that we are trying to be very careful. I don't think that the *Finley* case would occur today. I think the personnel community, which ordinarily does not see investigative files, is much more alert to what they should keep their hands off. We have our own preachments about privacy, which are incorporated into one part of our regulations. We tell people not to ask questions about this kind of background and that kind of background.

I think we are marching in the direction I think you would have us go. The only thing I would say about the regulations at the moment is that the Commission has reviewed them. They were in a status at the time I last spoke to you, where the staff was still reworking them in light of comments we got from the public.

Well, the comments are all in, and those are a matter of public record. The Commission has taken another look at the regulations and has tentatively approved them. What the Commission wants now before it publishes those regulations is to see the internal guidelines that Mr. Drummond will be using with respect to his investigators and all others who have any effect on these matters at all, which will key them to how they will treat this kind of business.

Formerly, what guidelines we had were internal, and nobody could ever see what this was about. The Commission now wants those guidelines published so that everybody will know what the rules of the game are with respect to our picking up information about them and the circumstances under which and how it will be treated, for whatever disqualifying purpose.

We are also addressing our other regulations, which in part 731 for example, provide that for people hired subject to investigation, states a routine we follow. We don't tell people the confidential sources of information about them, but we do tell them names and places and dates with respect to any information that we regard as derogatory and which would disqualify them from employment. That is as far in due process terms as we felt we have been able to go, and that process is a procedure published in the books, of course, for all the world to see. But that process has been before the courts with no particular em-

phasis by the courts on whether it is good or bad, but in the series of *Scott* cases that went to the court of appeals, for example, that was the very process we used with Mr. Scott when we faced him with what information we had.

Again, this was 8 or 9 years ago, when we were still of the conviction as an institutional matter that homosexuals could not serve, and we told Mr. Scott we had evidence of that nature, and he declined to answer.

It went to court, but there was no criticism of whether we had handled the matter properly, and I think we did give the individual a fair shake concerning what we knew about him that was disturbing to us.

If it occurs to you that there are improvements that should be considered, we would certainly consider them, and my office is constantly conducting a kind of ombudsman-type function with respect to our regulations of this kind. If you know particular changes that we should be making, certainly we would be glad to hear of them.

Mr. WALDIE. I have no further questions.

Do you have further statements you desire to make?

Mr. DRUMMOND. No, sir. I don't. I would be pleased to furnish the information you asked for.

Mr. WALDIE. Thank you.

The committee is adjourned.

[Whereupon, at 11:26 a.m., the hearing was adjourned, subject to the call of the Chair.]

[The following letters and statements were received for inclusion in the record in response to the subcommittee's requests:]

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF PERSONNEL INVESTIGATIONS
WASHINGTON, D.C.

June 15, 1973

Honorable Jerome R. Waldie
Chairman, Subcommittee on
Retirement and Employee Benefits
Committee on Post Office and Civil Service
House of Representatives
Washington, D.C.

Dear Mr. Waldie:

I am pleased to furnish additional information responsive to the questions raised in the hearing before the Subcommittee on Retirement and Employee Benefits on Tuesday, May 15, 1973.

House Internal Security Committee File Searches

From November 3, 1972 to May 15, 1973, the Commission submitted 10,520 names for search of the House Internal Security Committee file under the criteria discussed at the hearing. (We have no breakdown on the number of these in the college category.) The searches revealed records on 1,459 persons with the same or similar names.

Comparison of identifying information available in the case files or source documents immediately screened out more than 95 percent as not material or pertinent to the person under investigation. This information was discarded. In this group then, the search had the positive value of a finding that there was nothing of record on the individual regarding activities within the scope of HISC competence. In the remaining instances, less than 5 percent, the information was included in the file as leads information to be resolved through further investigation. During the period covered by this review, there were no cases referred to the Federal Bureau of Investigation for a Full Field Loyalty investigation based solely on information resulting from a search of the HISC files.

The above percentages are estimates only. We do not maintain the extensive records and statistics that would be required to single out individual sources of information in terms of volume or relative impact on decisions ultimately reached. The HISC files are but one of many sources of record information and testimony. Case decisions are balanced judgments on the total composite of a volume and variety of investigative

information, representing in most instances a mix of favorable and unfavorable information. We have not had the staff or funds for a record keeping endeavor of this magnitude. To be responsive to your request in more detail would entail an individual review of the investigative case files for the year. We are sure you would not wish us to incur this prohibitive cost.

I would stress again that none of the information from the HISC checks is considered disqualifying in itself. It must be corroborated independently, investigated thoroughly, and evaluated objectively in terms of its significance and materiality before it can be used as a possible basis for disqualification.

Further Information on CSC Suitability Cases

In elaboration of my testimony that the Commission instructed 123 removals and decided not to accept 3,394 applications, there were a number of other cases which were discontinued upon receipt of notice that the person had resigned, had been separated, or was no longer under consideration. There were 386 such appointee cases and 308 applicant cases. We do not maintain a further statistical breakdown on these and have no figures on the extent to which the individual resigned or withdrew upon being given the opportunity to comment upon unfavorable matters or learning he was being investigated for suitability reasons. From our experience this does occur frequently.

Appeals from CSC Suitability Decisions

The Commission does not maintain statistics on the number of individuals who are successful on appeal from adverse suitability decisions.

Agency Actions Following Receipt of CSC Investigative Reports

As indicated in the testimony, the Commission furnishes the results of its investigation in nonsensitive or noncritical-sensitive cases to the employing agency after determining that the information is not sufficient to disqualify for employment in the service generally. These are cases resulting from the low-cost national agency check and inquiry program. Agencies do use this information as a basis for determining whether the appointee may properly be employed in a particular position on the basis of their specific knowledge of the duties of the job, the trust it entails, the work location and environment, etc. They also use the results in some cases in authorizing access to classified information or work areas. The Bureau of Personnel Investigations does not require the agency to report on the employment determination it makes based on the investigation in these cases.

Some statistical data is, however, reported by agencies to the Commission's Bureau of Manpower Information Systems. Input from the agencies to the computerized Central Personnel Data File indicates that in fiscal year 1972 there were 8,700 terminations during the probationary period for unsatisfactory performance or conduct. Of these, some 600 were based on conditions arising before the appointment. While there is no further statistical breakdown, some of these undoubtedly included consideration of investigative information. It is important to note that agencies are authorized to effect separations based on preappointment conditions, and in doing so they must comply with Civil Service Regulation 315.805 which specifies that the employee is entitled to (a) notice of proposed adverse action, (b) reasonable time to file a written answer, (c) consideration of the answer by the agency in reaching its decision, (d) notice in writing of the agency's decision, and (e) notification of appeal rights to the Commission.

Distribution of Adverse CSC Decisions by Suitability Disqualification

In response to your questions about the number of adverse decisions made by the Commission for each of the suitability disqualifications, we have made a substantial sampling of the cases closed during 1972 and furnish the following percentage breakdowns for the two categories of cases:

| <u>Disqualification</u> | <u>Separation Instructed</u> | <u>Application Rejected</u> |
|--|----------------------------------|---------------------------------|
| Dismissal from employment for delinquency or misconduct. | 6.5% | 15.5% |
| Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct. | 82.5% | 40.0% |
| Intentional false statement or deception or fraud in examination or appointment. | 1.0% | 0.5% |
| Refusal to furnish testimony as required by section 5.3 of Rule V. | 0.0% | 0.0% |

Habitual use of intoxicating beverages to excess.

4.5%

2.0%

Reasonable doubt as to the loyalty of the person involved to the Government of the United States.

0.0%

0.0%

Any legal or other disqualification which makes the individual unfit for the Service.

5.5%

42.0%

The "legal or other" disqualification principally consists of cases in which the person failed to respond to official correspondence -- e.g., when asked to come in for an interview or to respond to a letter of interrogatory affording the opportunity to comment upon or explain unfavorable matters.

Agency Feedback on Full Field Investigations

Concerning your request for feedback on the 20,000 full field investigations the Commission conducted for other agencies, we receive some feedback related to our responsibility under Section 14 of Executive Order 10450 to assure timely agency action following receipt of completed reports. After the card records submitted to us have served this purpose we do not maintain them by fiscal year, nor do we maintain statistics on the number and nature of agency decisions. To make a manual tally on agency actions during a given period would require going through a very large number of cards accumulated over the years. This would not produce definitive answers to your questions because we do not require feedback on --

- Cases outside the Federal service, such as AEC contractor personnel and International Organization cases. These make up about half our workload.
- Federal applicant cases not involving seriously derogatory suitability information.

The latter category includes those cases in which the greatest value of preappointment full field investigations is found -- namely, selection decisions based not on adverse information but on a finding that the applicant has not demonstrated through his record of past performance that he possesses the attributes, qualities and skills essential to

success in the particular position for which he is being considered. Depending upon the requirements of the job, these may include leadership qualities; maturity of judgment; resourcefulness, flexibility, and emotional stability under stress; ability to communicate orally and in writing; ability to deal with others and to get people to work together; trustworthiness and personal integrity; and growth potential.

Thus the partial information on numbers of negative decisions on suitability that we do have in our files would be meaningless taken out of the larger context and the high cost of extracting this data would not be justified. In positive terms apart from numbers, however, I would assure you that our emphasis in agency contacts and visits is focused on the effectiveness with which agencies --

- Assure quality selections and make proper placements in positions of responsibility and trust;
- Use the reports in making appointment decisions and deciding on access clearance;
- Afford individual employees fair, impartial, and equitable treatment at the hands of the Government;
- Safeguard legitimate governmental interests without impinging on individual rights.

Reports of CSC Security Appraisals

Attached as requested are copies of letters sent by the Chairman of the Civil Service Commission to the heads of agencies furnishing the results of recent security appraisals.

Custody and Access to Investigative Reports

The basic directive on custody and access to investigative reports is contained in Executive Order 10450, Section 9 (c), as follows:

"The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs

under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business."

Instructions issued by the Commission in Chapter 736 of the Federal Personnel Manual include the following provisions on safeguarding investigative information:

"Classified information must be safeguarded in accordance with the provisions of Executive Order 10501. Other investigative information which is not classified must be kept in confidence in accordance with section 9(c) of Executive Order 10450. Such material may be returned to the Commission as soon as it has served its purpose in the agency and while the employee is still on its rolls. Investigative reports and material will not be made a part of the Official Personnel Folder, nor included in any files disposal schedule of the agency, and may be recalled by the Commission at any time. Therefore, they should be maintained by the agency where they are readily available for return to the Commission upon request."

The cover sheet on each investigative report further contains these restrictions:

This report is the property of the United States Civil Service Commission and may be recalled at any time. Transfer of this report to another agency is not permitted without prior consent of the Commission. The report and its contents must be safeguarded in a manner to prohibit unauthorized disclosure. Access is to be limited to those persons whose official duties require it.

In practice, agencies usually retain reports of full field investigations, under the control of the security officer, during the person's employment. The file then is readily available for immediate decision by the security officer on access to classified information on a need-to-know basis or for review in conjunction with respect to decisions on particularly sensitive assignments. It forms the basis for decisions on the action necessary to update the record periodically as required for persons occupying positions that are critically sensitive in terms of the national security or the high degree of responsibility and trust involved.

The extent to which agencies are properly safeguarding the physical security of the investigative files and controlling access to them is reviewed as part of every security appraisal conducted by the Commission.

If you have further questions about the investigation program, I shall be pleased to answer them.

Sincerely yours,



Robert J. Drummond, Jr.
Director

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF PERSONNEL INVESTIGATIONS
WASHINGTON, D.C. 20415

AUG 22 1974

Honorable Jerome R. Waldie
Chairman, Subcommittee on Retirement
and Employee Benefits
Committee on Post Office and Civil Service
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Waldie:

The following information is furnished in response to your request at the hearing on August 8 of your Subcommittee on Retirement and Employee Benefits.

The Commission's Security File has been specifically identified and described in the Commission's budget request over the years. This language from the budget request for fiscal year 1971 is typical:

The Security Files consist of approximately 2,120,000 index cards containing information relating to Communist and other subversive activity. National agency check and inquiry cases and full field investigations required under Executive Order 10450 include a search of these files. The information contained in these files has been developed from published hearings of Congressional Committees, Legislative Committees, public investigative bodies, reports of investigations, publications of subversive activities and various other newspapers and periodicals. The investigative and intelligence agencies of the various departments and agencies of the Federal government make extensive use of these files. Experience has shown that of the cases converted to full field investigations to be made by the FBI a substantial proportion was converted on the basis of information derived from these files.

Similar wording was included in earlier budgets. The fiscal year 1972 budget request referred to the Security Files by name but without the detailed description. Our budgets since then contain no reference to any of our files. This is because the detailed supporting statements formerly included are now omitted in the interest of streamlining the Commission's budget presentation. This was done with the concurrence of the appropriations subcommittee of the House that deals with our budget.

Apart from the budget references mentioned above, the Security File is not specifically mentioned in any statutory authority. We rely instead upon our broader authorities to conduct investigations as detailed in my letter to you dated August 2, 1974. We consider that the authorities and the requirements to conduct investigations as delineated in that letter carry with them the concomitant authority to do what is necessary to effectively discharge our investigative responsibilities.

Input to the Security File is governed by a set of principles laid down initially by the Civil Service Commissioners in 1948 following Congressional hearings and an exhaustive review of the file's function, value and usefulness. In essence, these principles are as follows:

1. No information is added to the file unless its insertion is approved by a responsible official who is well versed in the fields of loyalty and security.
2. No information is added unless identity is or can be reasonably established.
3. Only information from sources of the types enumerated in the budget language quoted on page 1 of this letter may be inserted.

These principles have proven effective over the years and we continue to apply them today in inserting material relevant to the criteria in Executive Order 10450.

Concerning access to information from the Security File, let me first supply this background: The file contains information bearing on the loyalty/security affiliations and activities of organizations and individuals for use in making efficient and prompt investigations. It saves much time and money in making investigations by providing in one place a large amount of pertinent information that could otherwise be obtained only by checking literally hundreds of sources in each case. It could in that respect be compared to a newspaper morgue.

The information in this index is not included for the purpose of stating unequivocally that a reasonable doubt exists as to an individual's loyalty or security fitness; in fact, some of the information serves as a guide to a contrary finding. The information is included as a guide to, or source of, lead information which can be used as a basis for

investigation to obtain the full facts necessary to determine the person's suitability for government employment. No one is disqualified because his name is in the file. Potential questions of suitability raised by search of the file are referred for investigation either by the Commission or, when the issue is loyalty or security, to the Federal Bureau of Investigation for a full field investigation.

Before any information can be so referred for investigation, our operating instructions require that it be reviewed by a supervisory official for its relevancy, significance, potential value as an investigative lead, and a determination as to whether the information is sufficient to provide an investigative basis for positive identity resolution. The form referring the information for CSC or FBI investigation contains these cautionary statements:

The information . . . is supplied solely as an aid in an inquiry or the conduct of an investigation. The information is not to be considered as having been positively identified by the Commission with either the person(s) or organization(s) named in the request for search since the identity of the person and the credibility of the information have not been established or verified. Further, the mention of an organization is not to be taken as a characterization by the Commission of either the nature or purpose of such organization.

The ensuing investigation then resolves the identity issue fully, obtains the facts about the loyalty/security questions and provides a full report. Next the case is evaluated by experienced Civil Service Commission evaluators if it is under the Commission's jurisdiction, or by security officials in the employing agency if the position is sensitive or outside the competitive civil service.

Beyond these investigative referrals, our policy permits release of Security File information only under strictly controlled circumstances such as:

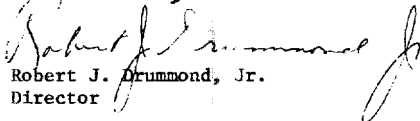
- Release of investigative files after resolution of identity to authorized officials of other agencies who request it for legitimate investigative or security purposes.
- Release of information from the Security Files without accompanying investigation to other government investigative agencies which conduct their own full field investigations, provided the information is identifiable with the subject of their investigation. This is always accompanied by the cautionary statement quoted above that the information is for investigative leads purposes.

-No information is released outside the government and none is released within government that does not meet the condition of legitimate investigative or security need as described above.

In our operation of this file, the Commission does not accord different treatment to persons of high office or grade, with one exception. During hearings in October 1947 before a Subcommittee of the House Committee on Expenditures in the Executive Departments, we were virtually directed to remove the names of any Congressmen mentioned in the file, then known as the Investigators' Leads File. We did so, and have followed the practice ever since. No information is input to the Security File on persons known to hold public elective office at the national level. Biannually the names of newly elected national officials are checked against the file and any records contained therein are removed. All such records are destroyed.

The file also received attention at the Presidential level at the time of the hearings. By letter of October 21, 1947, to the Subcommittee, President Truman affirmed the Commission's position that the records were to be maintained on a confidential basis. I would conclude by adding that to my knowledge no person has been treated unjustly or unfairly because of improper use of information in the Security File.

Sincerely yours,


Robert J. Drummond, Jr.
Director

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF PERSONNEL INVESTIGATIONS
WASHINGTON, D.C. 20415

August 2, 1974

Honorable Jerome R. Waldie
Chairman, Subcommittee on Retirement
and Employee Benefits
Committee on Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Waldie:

This is in reply to your letter of July 10, 1974 concerning personnel investigations.

To put our responses to your questions in perspective and provide a common frame of reference for the terms used, we describe briefly the principal types of investigations we conduct.

With limited exceptions for short term temporary appointments all appointments in the Federal service are subject to investigation. These investigations are of two principal types: full field investigations; and national agency checks and inquiries (NACI).

Full field investigations are conducted for all positions having duties that are critical in terms of the national security.

A full field investigation is an investigation conducted personally by investigators to obtain full facts about the background and activities of the individual under consideration. It includes three basic elements: (1) A national agency check covering the files of the major governmental investigative agencies including the files of the Federal Bureau of Investigation, the Civil Service Commission, and the military departments as appropriate; (2) personal interviews with present and former employers, supervisors, fellow workers, references, neighbors, school authorities; and (3) checks of police and other pertinent records including military service, FBI field office, and credit records when necessary. These investigations provide intensive coverage of the most recent five years plus coverage beyond that time if necessary to resolve materially derogatory matters.

Positions of lesser sensitivity require national agency checks and inquiries (NACI). The NACI consists of national agency checks as described above, plus written inquiries to former employers, supervisors, references, law enforcement offices, and schools attended. The inquiries cover the most recent five years.

If the NACI investigation develops derogatory information that appears to be disqualifying, a limited personal investigation is conducted to obtain the facts about the person's recent activities for the purpose of determining present suitability for Federal employment. The investigation is limited in scope to that necessary to resolve the issue.

Applicant suitability investigations are conducted to resolve questions disclosed during the processing of applications for employment. Their purpose is to obtain the facts necessary to resolve the issue and make a decision as to acceptance of the application. Investigative coverage is limited accordingly.

Whenever an investigation discloses a question of loyalty or security under the criteria given in Executive Order 10450 or Part 731.201(f) of the Civil Service Regulations, the Commission discontinues its investigation and refers the case to the Federal Bureau of Investigation for a full field loyalty investigation.

The Commission also conducts a variety of investigations related to appeals, complaints, and administration of the merit system.

Our answers to your questions follow. For convenience of reference we repeat each question before giving the answer.

DOES THE CIVIL SERVICE COMMISSION CONDUCT FULL FIELD INVESTIGATIONS OF COMPETITIVE SERVICE EMPLOYEES IN NON-SENSITIVE POSITIONS WHEN THE NACI INDICATES SOME NATIONAL SECURITY INCONSISTENCY?

The Commission does not conduct a full field investigation in any case in which the NACI indicates a question of loyalty or security coming within the scope of the security criteria given in E.O. 10450 or the criterion of reasonable doubt as to loyalty given in Part 731.201 of the Civil Service Regulations. These investigations are the responsibility of the Federal Bureau of Investigation.

The Commission does investigate suitability questions coming within the scope of the suitability disqualifications (other than loyalty or security issues) given in Part 731.201 of the Civil Service Regulations. These are limited personal investigations as described in the introductory part of this letter, rather than full field investigations.

WHAT CIRCUMSTANCES ARE REQUIRED TO INITIATE AN INVESTIGATION OF AN EMPLOYEE, SUBSEQUENT TO THE PRIMARY NACI CONDUCTED AT THE TIME OF APPOINTMENT, WHEN THE INDIVIDUAL WAS CLEARED OF ALL SUITABILITY OR NATIONAL SECURITY QUESTIONS AT THE OUTSET OF SERVICE?

An investigation of an employee may be initiated under these circumstances:

- o When information is received indicating that retention of the employee may not be clearly consistent with the national security.
- o When allegations of misconduct are received.
- o When new duties require a higher sensitivity designation calling for more comprehensive investigation than that initially conducted.
- o When violations of the civil service laws, rules or regulations are alleged.

WHAT IS THE SPECIFIC STATUTORY AUTHORITY FOR THE COMMISSION'S CONDUCTING INVESTIGATIONS TO DETERMINE SUITABILITY AND TO INSURE THE NATIONAL SECURITY? WHERE DOES IT SAY THAT THE COMMISSION HAS THE EXPRESSED AUTHORITY TO DO THIS?

Section 2 of the Civil Service Act of 1883 requires the Commission to aid the President in preparing rules and regulations for carrying the Act into effect, provides for examinations which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service, and authorizes the Commission to make investigations concerning the facts on all matters touching the enforcement of the rules and regulations. The Civil Service Act has now been codified in Title 5, U.S. Code.

Section 3301 of Title 5, U.S. Code provides as follows:

The President may -

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

Section 3304 of Title 5, U.S. Code, authorizes rules which provide for testing the relative capacity and fitness of applicants.

Section 1301 of Title 5, U.S. Code provides that the Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under Title 5 for the administration of the competitive service. Section 1302 provides for issuance of regulations by the Commission, subject to the President's rules, governing the administration of the competitive service.

Section 1303 of Title 5, U.S. Code authorizes the Commission to investigate and report on the enforcement and effect of the rules and regulations.

Section 1304 of Title 5, U.S. Code, provides for the conduct of investigations by the Commission and for their financing.

Section 5.2 of the Civil Service Rules provides that the Commission may make appropriate investigations of the qualifications and suitability of applicants for positions in the competitive service; and Part 731 of Title 5, Code of Federal Regulations makes appointments subject to investigation by the Commission and provides a one-year period of Commission jurisdiction.

Copies of the above-cited authorities are given in Tab A.

Executive Order 10450 prescribes investigations of all persons entering the Federal service. A copy is included in Tab E. Executive Order 11785, recently issued to amend E.O. 10450, is also in Tab B. Section 8(b) of E.O. 10450 designates the Commission to make investigations for the competitive service, and Section 8(c) authorizes use of the Commission's investigative services, either by law or by agreement with the Commission, for excepted positions in agencies which lack investigative facilities.

Other authorities for investigations are as follows:

Section 2165 of Title 42, U.S. Code
(formerly the Atomic Energy Act of 1954, as amended)

Executive Order 10422, as amended, covering employment
in international organizations

Section 2455 of Title 42, U.S. Code
(formerly the National Aeronautics and Space Act, P.L. 85-568)

Section 2585 of Title 22, U.S. Code
(formerly P.L. 87-297)

Section 1434 of Title 22, U.S. Code
(formerly P.L. 80-402)

Specific authorization for the Civil Service Commission to conduct full field investigations previously conducted by the Federal Bureau of Investigation for a number of other agencies was provided in Public Law 298, 82nd Congress.

In addition to the provisions cited above, there are various acts of Congress that contain implied authority for the Commission to investigate, such as laws prohibiting the purchase and sale of office, conspiracy, and other prohibitory statutes. Also, good business practice and custom suggest that those entrusted with appointive power by the Congress have authority to inquire into the competence and integrity of prospective officers and employees.

IS THERE A DIFFERENCE BETWEEN THE EXTENT AND ACTUAL IMPLEMENTATION OF INVESTIGATIONS CONCERNING QUESTIONS OF SUITABILITY AND/OR QUESTIONS OF NATIONAL SECURITY? DOES THE FULL FIELD INVESTIGATION SERVE THE PURPOSES OF BOTH INQUIRIES? WHAT IS A "LIMITED PERSONAL INVESTIGATION"?

Yes, there is a difference. As indicated in the introductory part of this letter, full field investigations are made for positions having duties that are critical in terms of the national security. They are comprehensive in scope, providing intensive coverage of the most recent five years as a minimum. If suitability matters are disclosed by these investigations, they are of course covered thoroughly as part of the same investigation.

Suitability questions raised in NACI investigations for positions of lesser sensitivity are resolved by limited personal investigation. These are limited in the sense that they are of limited scope and are restricted to obtaining the facts necessary to decide the person's present suitability for employment.

WHAT ARE THE ACTUAL NUMBERS OF INVESTIGATIONS CONDUCTED IN EACH OF THE LAST FOUR(4) YEARS BEYOND THE NORMAL NACI PROCEDURES? HOW MANY DID THE CIVIL SERVICE COMMISSION CONDUCT ON BOTH SUITABILITY AND NATIONAL SECURITY GROUNDS WITHIN THE COMPETITIVE SERVICE?

WHAT ARE THE ACTUAL NUMBERS OF DISQUALIFICATIONS ON THE GROUNDS OF SUITABILITY AND NATIONAL SECURITY DURING EACH OF THE LAST FOUR(4) YEARS?

The information in response to the above two questions is shown in Tab G. It is limited to investigations and actions by the Civil Service Commission. We do not have comparable data for other agencies. Every person disqualified by Commission action is notified of the reasons and given the right of appeal.

WHAT SPECIFIC CRITERIA ARE CIVIL SERVICE REVIEW OFFICERS GIVEN THAT ALLOW A DETERMINATION OF UNSUITABILITY FOR COMPETITIVE SERVICE EMPLOYMENT ON THE GROUNDS OF "IMMORAL CONDUCT"? (UNDER SUBCHAPTER 2, SECTION 2-1, SUBSECTION a1. OF CHAPTER 731, FEDERAL PERSONNEL MANUAL). IF YOU HAVE THE INFORMATION, HOW MANY EMPLOYEES WERE DISQUALIFIED FROM COMPETITIVE SERVICE POSITIONS FOR "IMMORAL CONDUCT" IN EACH OF THE LAST FOUR(4) YEARS?

Our present instructions to suitability rating personnel on immoral conduct are quoted in Tab C.

The Commission has just completed an exhaustive review of its suitability practices and has approved a revision of the regulations on suitability appearing in Part 731 of 5 CFR, subject to the approval of related guidelines for their application. The wording of the new regulations will not include "immoral conduct." We now are developing the guidelines and expect to publish the regulations and guidelines concurrently for use by Commission and agency evaluators. We expect to issue these in about three months.

The new regulations will provide for determinations on the basis of job-relatedness or "nexus." Adverse decisions will be founded upon whether the action will promote the efficiency of the service --specifically whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or whether it may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

Under the revised regulations, heterosexual and homosexual conduct will be treated alike. This is responsive to a number of recent court decisions, including the case of Society for Individual Rights et al. v. Hampton. Thus we have modified our former practice of disqualifying persons on the basis of homosexual conduct without regard to nexus considerations.

We do not keep statistics on the reasons for disqualifications by separate category. However, in our letter to you dated June 15, 1973 we reported that, based on a sampling of cases closed in 1972, 82.5% of the removals directed by the Commission were under the "criminal,

infamous, dishonest, immoral or notoriously disgraceful conduct" disqualification. In applicant cases, 40% of the applications rejected were under the same disqualification. We have made no subsequent survey but have no reason to believe these percentages are not still approximately accurate.

WHAT STATUTORY AUTHORITY DOES THE CIVIL SERVICE COMMISSION HAVE FOR KEEPING PERSONNEL INVESTIGATION FILES CONFIDENTIAL WITHOUT GRANTING ACCESS TO THE CONCERNED INDIVIDUAL? WHAT IS THE STATUTORY AUTHORITY FOR DENYING EMPLOYEE ACCESS TO THE INVESTIGATORY FILES?

Section 294.601 (Tab D) of the Code of Federal Regulations, issued pursuant to Section 552 of Title 5, U.S. Code, sets forth the circumstances under which the subject of investigation may have access to investigative information. It also specifies the conditions under which access is denied. These regulations are an implementation of the functions of the Chairman of the Commission to execute and administer the Commission's business (see 5 U.S.C. 1104(a) (5)), with the aid of the full Commission in the setting of relevant rules (5 U.S.C. 1104(b) (2)). The regulations note (5 CFR 294.103) that the Commission will observe prohibitions on disclosure in "law or Executive order." Executive Order 10450 provides that investigation reports are to remain confidential.

WHAT SPECIFIC CRITERIA DOES THE COMMISSION USE IN GRANTING ACCESS A/OR RELEASE OF PERSONNEL INVESTIGATORY FILES TO OTHER AGENCIES CONDUCTING SECURITY PROGRAMS AS ALLOWED FOR IN SECTION 9(c) OF EXECUTIVE ORDER 10450?

Duly accredited investigators, special agents and security officers of other Federal Executive agencies are permitted to review CSC investigative files on persons in whom they have an official investigative or security interest. A copy of the report of investigation may be furnished to the Security Office of an Executive agency when the request is in writing and the reason it is needed is clearly stated. The employing agency is allowed to retain copies of CSC investigative reports during the tenure of the employee with the agency.

A fundamental purpose of our release of investigative information to agencies as described above is to avoid unnecessary duplication of investigation. If the reports of previous investigation were not made available to meet current needs, the costs to government agencies of conducting new investigations would be prohibitive, and that reason furnishes basic support for Section 9(c) of E.O. 10450

Our investigative reports contain these restrictions on the cover page:

Information in this report has been obtained under a pledge of confidence. The report and its contents must be safeguarded in a manner to prohibit unauthorized disclosure. Access is to be limited to those persons whose official duties require it.

Further, each agency representative who reviews a file at the Commission must sign a pledge as follows:

I, a representative of the agency named below, have been duly authorized in connection with my official duties to request and examine the file on the person named above. I understand that I am prohibited from giving the information contained in the file to any unauthorized person. I further understand that I may not take any papers from the files.

ACCORDING TO SECTION 5-1, SUBCHAPTER 1 OF CHAPTER 731, FEDERAL PERSONNEL MANUAL, THE JUSTIFICATION FOR KEEPING SUITABILITY INFORMATION IN CONFIDENCE IS "... TO PROTECT GOVERNMENT PERSONNEL AGAINST DISSEMINATION OF UNFOUNDED OR DISPROVED ALLEGATIONS." DOES THE COMMISSION COMPILER SUCH INFORMATION AS PART OF A PERSONNEL INVESTIGATORY FILE? IF SO, WHAT IS THE JUSTIFICATION FOR COMPILATION OF SUCH INFORMATION? HOW DOES THIS RELATE TO QUESTIONS OF SUITABILITY IF IT ADMITTEDLY IS INFORMATION THAT HAS NO BASIS IN FACT?

This statement was not intended to create the impression it apparently has. During the course of our investigations much information is obtained, both favorable and unfavorable. Any derogatory information is carefully checked by contacting other sources to assure that no injustice is done. Often allegations are disproved or established as unfounded. The reports reflect this resolution. The allegations and the refutation of them both are incorporated in the reports. This is done to safeguard the individual against the possibility that the allegations may later arise and for some reason the witness or record source that refuted them are no longer available. The purpose of the cited instructions is to emphasize the importance of not disseminating any investigative information except on an absolute need to know basis and to minimize the risk of information being taken out of context by persons not qualified to evaluate it objectively.

ACCORDING TO SUBSECTION A, SECTION 3-1, SUBCHAPTER 3 OF CHAPTER 731, FPM, EVERY APPOINTMENT TO A POSITION IN THE COMPETITIVE SERVICE IS SUBJECT TO INVESTIGATION EXCEPT: PROMOTION AND SEVERAL OTHER SITUATIONS. YET AN INCONSISTENCY APPEARS TO EXIST IN THE AUTHORITY GRANTED TO THE COMMISSION. SUBSECTION B, SECTION 1-1, SUBCHAPTER 1 OF CHAPTER 736, FPM STATES: "THE COMMISSION ALSO CONDUCTS...QUALIFICATIONS INVESTIGATIONS FOR HIGHER GRADE POSITIONS IN THE COMPETITIVE SERVICE." IS THIS NOT AN INVESTIGATION THAT IS CONDUCTED FOR PURPOSES OF DETERMINING WHETHER PROMOTION IS WARRANTED? IF SO, PLEASE EXPLAIN THE APPARENT DISCREPANCY IN COMMISSION RESPONSIBILITY.

Promotions are not subjected to the suitability investigations required by Chapter 731. In a relatively small number of instances it is necessary to determine through investigation that a person possesses the requisite qualifications for effective performance in a higher level position. Most of these investigations are conducted on candidates for supergrade positions. These investigations cover qualities that cannot

readily be determined by a test or application review, including such matters as leadership ability, administrative capacity, ability to meet and deal with others, to communicate effectively, etc. This is quite distinct from the negative aspects of conduct, character and general suitability. Of course if the position to which the person is being considered for appointment is at a higher level of sensitivity requiring a more comprehensive investigation than that previously conducted, one would be made for that purpose. When both qualifications and higher sensitivity are involved concurrently, the necessary coverage is obtained in one investigation.

WHAT SYSTEM OF REVIEW DOES THE COMMISSION HAVE TO DETERMINE:

1. THE ON-GOING PERFORMANCE OF THE CIVIL SERVICE INVESTIGATOR,
2. THE ON-GOING PERFORMANCE OF REVIEW OFFICERS INVOLVED IN SUITABILITY MATTERS? HOW ARE THESE PEOPLE EVALUATED AND WHAT SYSTEM OF CHECKS EXIST?

Commission investigators receive the type of training and supervision that is necessary to assure competent performance, the integrity of the investigative process and the merit system and to safeguard the rights of individuals. Supervisory investigators review completed reports of investigation, accompany investigators on a sampling basis during their investigations, and periodically reinterview witnesses to assure that the investigator is performing properly, as a basis for corrective training as necessary. Supervisors also make periodic comprehensive analyses of each investigator's performance record as well as keeping posted through daily work reports submitted by each investigator.

To avoid unwarranted invasion of privacy of the individuals investigated, investigators are subject to the strict prohibitions shown in Tab E.

The completed investigative reports are given a critical quality review at the Commission's central office before transmittal to the employing agency. The final test of acceptability is at the employing agency itself, which depends upon our investigative services and properly may expect a quality product.

Similarly, the work of suitability evaluators is subjected to higher level review -- by supervisory officials who must act on their recommendations, by appeals officials on cases in which appeals are filed, and ultimately by the courts if judicial relief is sought on legal or constitutional issues.

HOW MANY PEOPLE AT THE CIVIL SERVICE COMMISSION HAVE ACTUAL OR ALTERNATE ACCESS TO THE INVESTIGATORY FILES RELATING TO PERSONNEL MATTERS THAT ARE MAINTAINED THERE? WHAT SPECIFIC SAFEGUARDS EXIST THAT PREVENT ABUSIVE MANIPULATION OF THE FILES BY THOSE WHO MAY HAVE ACCESS TO THEM?

The Commission's investigations program employs some 1100 people, all of whom have had a full field investigation. To the extent that these employees must handle investigative information or reports in the course of discharging their day-to-day duties, they would have some access to investigatory files within the scope of your question. But this is limited to the individual cases or parts of cases on which they must perform work. No Civil Service employee is entitled to indiscriminate access to investigative files. Access is strictly limited to a need to see individual case files when required in the performance of the employee's duties. The safeguards and procedures governing access to files and designation of persons authorized access are outlined in the instructions attached as Tab F.


A record is kept of every investigative file charged out of our investigative files, showing the date and the name of the requestor. This facilitates fixing responsibility if improprieties occur. A covering referral form contains a statement stressing the required safeguards and prohibiting removal of any papers from the file.

Violations would be subject to disciplinary action, including removal if warranted. The following statutory provisions are applicable:

- o The prohibition against disclosure of classified information, in 18 U.S.C. 798, 50 U.S.C. 783.
- o The prohibition against disclosure of confidential information, in 18 U.S.C. 1905.
- o The prohibition against fraud or false statements in a Government matter, in 18 U.S.C. 1001.
- o The prohibition against mutilating or destroying a public record, in 18 U.S.C. 2071.

We trust you will find the foregoing responsive to your questions,
and will be pleased to furnish further information on request.

Sincerely yours,


Robert J. Drummond, Jr.
Director

NOTE: The information referred to as Tab A, B, D,
and F, was retained in the files of the subcommittee.
The information referred to as Tab C and Tab G,
follows:

TAB C

Present Criteria for Determining Unsuitability on Grounds of Immoral Conduct

The Commission does not consider itself to be the guardian of the public's morals. Its function in this area is to evaluate "the qualifications and fitness of candidates for employment in such manner as to promote good government and assure fair, impartial, and equitable treatment of individuals." It establishes suitability standards for Federal employment on a nationwide basis. In some instances these standards may not be in strict accord with State laws pertaining to immoral conduct. The State laws themselves often vary between different States and in some States laws on the books are outmoded and no longer enforced. In order to provide for equitable treatment, the Commission's decisions must be based upon nationwide application of suitability standards. Our main concern in deciding these cases is to determine whether or not the immoral behavior is such as to render the applicant, in the minds of responsible people, unfit for Federal employment. It should be clear in reaching an adverse decision in these cases that the Federal service would suffer by permitting the employment of the person.

Evaluation of cases involving immoral conduct requires consideration of:

1. The extent to which the person's conduct indicates a gross or flagrant abuse of generally accepted standards of moral behavior and would be seriously offensive to the sensibilities of the average person. Under this guide we would disqualify a prostitute or a person who engages in promiscuous sex behavior. However, depending on the circumstances in the individual case, we would not be obligated to disqualify a person living with a member of the opposite sex, (provided, of course, there is no legal impediment to the association such as an existing marriage of either party to another person) in circumstances in which the union is stable and is socially accepted in the community. The fact that the person is a parent of an illegitimate child, or children would not, in itself, require disqualification; we would have to consider all the circumstances in the case in determining whether or not the person is unfit for Federal employment.
2. The seriousness of the act, or acts (or failure to act).
3. The age of the person at the time the conduct occurred.
4. The person's general reputation.
5. Whether the immorality represents a few isolated occurrences compared to a pattern of conduct of flagrant abuses of generally accepted moral standards.

6. Whether or not notoriety, scandal, or censure were involved in the conduct. This guide is especially applicable in cases of a person living with a person of the opposite sex without formal marriage. This guide is also applicable in the so-called "skeleton in the closet" case. The Commission is not necessarily obligated to exhume such skeleton if rehabilitation has been accomplished, if the person has a good reputation in the community, or if on other grounds he is not unfit for Federal employment.

7. The extent to which the person's conduct brings serious discredit to the Federal service.

8. The degree to which his conduct is a hazard to others.

9. The recency of the conduct and whether rehabilitation has taken place.

Data on Investigations and Disqualifications

Civil Service Commission

| | <u>1971</u> | <u>1972</u> | <u>1973</u> | <u>1974</u> |
|---|-------------|-------------|-------------|-------------|
| <u>Full Field Investigations</u> | 24,046 | 20,060 | 17,388 | 22,760 |
| (These cases are decided by the employing agency; hence no data on disqualifications are shown) | | | | |
| <u>Limited Suitability Cases</u> | 2,213 | 1,977 | 1,402 | 1,570 |
| Cases converted to limited personal investigation to resolve suitability issues | | | | |
| Removals directed | 265 | 171 | 111 | 82 |
| Cases discontinued because employee left the service after notice of pending investigation or charges | 1,559 | 643 | 504 | 549 |
| <u>Applicant Suitability Cases</u> | 3,404 | 2,960 | 3,845 | 1,895 |
| Limited personal investigations to resolve suitability questions disclosed in the processing of applications | | | | |
| Applications rated ineligible | 975 | 802 | 447 | 519 |
| Cases discontinued because applicant withdrew or was dropped from consideration after notice of pending investigation or charges | 113 | 99 | 78 | 361 |
| <u>Special Suitability Determinations</u> | 21,471 | 13,950 | 11,524 | 11,481 |
| Determinations on suitability questions disclosed in the processing of applications, made on the basis of records and correspondence without personal investigation | | | | |
| Applications not accepted | 6,216 | 3,504 | 2,699 | 2,182 |

These are cases in which the application or related papers disclose serious questions as to present suitability for Federal employment, often involving felony conviction or discharge from employment for cause. Our 1973 survey disclosed that close to 40% of the cases in which the applications were not accepted were not based on a finding of ineligibility but on the necessity to drop the applicant from consideration for failure to reply to official correspondence requesting further information.



LEGISLATIVE
AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

July 19, 1974

Honorable Jerome R. Waldie
Chairman, Subcommittee on Retirement
and Employee Benefits, Committee on
Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

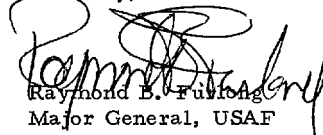
Dear Mr. Chairman:

This is in response to your letter of July 16 requesting Department of Defense participation in hearings before your Subcommittee on August 8 to testify on personnel investigation policies and the compilation and maintenance of personnel investigation files within the executive agencies.

Mr. D. O. Cooke, Deputy Assistant Secretary (Administration), Office of the Comptroller, has been designated as the principal witness for the Department of Defense. He will be accompanied by Mr. J. J. Liebling, Deputy Assistant Secretary (Security Policy), Office of the Comptroller, and Brigadier General Joseph J. Cappucci, Director, Defense Investigative Service.

A member of my staff, Colonel Stephen R. Harrick (695-7104) has been designated as the staff coordinator and he will be in contact with your staff director to discuss the details of the hearing.

Sincerely,


Raymond B. Fubling
Major General, USAF
Principal Deputy Assistant
Secretary of Defense



COMPTROLLER
(Administration)

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

August 6, 1974

Honorable Jerome R. Waldie
Chairman, Subcommittee on
Retirement and Employee Benefits
Committee on Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

On July 16, 1974, you wrote to Brigadier General Joseph J. Cappucci regarding a hearing conducted by your Committee at which you asked that Department of Defense representatives appear at 9:30 a.m., in Room 210 of the Cannon House Office Building on August 8, 1974.

In your letter you listed thirteen questions and asked that the Department of Defense respond to them prior to the hearing. Attached to this letter are the answers to your questions.

Please let me know if I can be of further assistance to you in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. O. Cooke".

D. O. Cooke
Deputy Assistant Secretary of Defense

Attachment

ATTACHMENT

1. Q. What are the standards, within the Department of Defense, that the Secretary uses to determine what action or association is inconsistent with the national security interests? Are these standards the same as those enumerated in Executive Order 10450?

A. Adjudicators in the Department of Defense apply the security standard prescribed in Section 8a of Executive Order 10450, as amended, which is that "employment or retention in employment in the Federal Service . . . is clearly consistent with the interests of national security." In applying this standard, which is incorporated in DoD Directive 5210.7 "Department of Defense Civilian Applicant and Employee Security Program," Section VII. A., the Department uses the security criteria of the Executive Order which are attached.

2. Q. Does the Department of Defense conduct full field investigations on personnel entering the employ of that department in non-sensitive positions, at anytime other than when inconsistencies are found in the NACI's? If so, how frequently does this occur and under what circumstances?

A. The Department of Defense does not conduct Full Field Investigations (i. e., Background Investigations) on personnel entering employment in non-sensitive positions at any time. If inconsistencies are found in a NACI, additional investigation limited to that needed to resolve the matter is conducted. Such additional investigation does not have the scope of a Background Investigation.

3. Q. Under what circumstances does the Department of Defense initiate an investigation of an employee, subsequent to the primary NACI, when at the time of appointment this individual was cleared of all suitability or national security questions?

A. Your question assumes that the Defense employee is in a non-sensitive or non-critical sensitive position for which nothing more than a NACI is required. Should he subsequently change to a critical sensitive position which almost

invariably requires access to Top Secret information, a Background Investigation is conducted as required by Executive Order 10450.

Additionally, a Bring-Up Investigation (updating) may be conducted after five years of service, if a review of a current Statement of Personal History or other records indicates that reinvestigation is in order.

If adverse suitability or security information about an employee under the criteria of E. O. 10450 arises during the course of his employment, additional investigation as appropriate is initiated.

4. Q. Does the Department of Defense conduct suitability investigations on individuals in that department who are not competitive service applicants? If so, what are the specific criteria used by the DoD to make such a suitability determination?

- A. Yes. As a general rule investigations of applicants for non-competitive service appointments in DoD are conducted by the Department of Defense.

The Department of Defense applies the identical criteria to applicants for competitive and non-competitive appointments.

The specific criteria used by the Department of Defense to make a determination as to eligibility for employment are set out in Section 8 of Executive Order 10450 (see attachment to Answer 1).

5. Q. What were the actual numbers of investigations conducted on defense employees in each of the last four (4) years, beyond the normal NACI procedure? How many of these were national security investigations?

- A. During the period FY 1970 - FY 1974 the following number of investigations conducted on defense employees have been expanded beyond normal NACI procedures:

| <u>FY 71</u> | <u>FY 72</u> | <u>FY 73</u> | <u>FY 74*</u> |
|--------------|--------------|--------------|---------------|
| 23,072 | 16,992 | 16,727 | 14,806 |

Data developed by the Department of Defense do not differentiate between suitability and national security investigations.

* This figure is an estimate based on data covering the first three quarters of FY 74

6. Q. What specific statutory authority does the Department of Defense have for conducting investigations to determine questions of suitability and national security?

A. The following statutes provide authorization for investigations to determine questions of suitability and national security:

5 USCA § 3301:

Authorizes the President to " . . . (2) ascertain the fitness of applicants (for the civil service) as to age, health, character, knowledge, and ability for employment sought "

5 USCA § 7301:

Authorizes the President to " . . . prescribe regulation for the conduct of employees in the executive branch. "

5 USCA § 7532:

Authorizes the suspension and removal of a Federal employee when the head of an agency considers such action necessary in the interest of national security.

5 USC 301:

Provides that the head of an Executive Department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property.

Further, Executive Order 10450 provides that
 "... appointment of each civilian officer or employee
 in any department or agency of the Government shall be
 made subject to investigation."

7. Q. What were the actual numbers of disqualifications, each on the grounds of unsuitability and national security, during each of the last four (4) years?

A. The Department of Defense system for the adjudication of personnel security cases is decentralized and there is no compilation of data available reflecting the actual number of disqualifications on suitability grounds. No removals or suspensions have occurred on the basis of national security during the past four years.

8. Q. What statutory authority does the Department of Defense have for keeping personnel investigation files confidential without granting access to the individual concerned? What is the authority for denying employee access to these personnel investigations files?

A. The confidentiality of investigative files may be protected from access by the individual concerned under Section 9(c) of Executive Order 10450, which provides for the confidentiality and safeguarding of investigative files by limiting access to such materials.

9. Q. What specific criteria does the Department of Defense use in granting access a/or release of personnel investigations files to other agencies conducting security programs, as allowed for in section 9(c) of Executive Order 10450? What are the guidelines that dictate whether or not release is warranted?

A. In general, summaries of investigations but not the investigative files themselves are released by the Military Departments and the Defense Investigative Service to other Federal Agencies authorized to conduct security programs under E. O. 10450 and then only on a strict "need-to-know" basis. Investigative data received from another Federal

agency is not released. The requester is referred to the agency that provided the information. A qualifying requesting agency is required by the Department of the Navy, for example, to certify selected investigative personnel to whom access or release is to be authorized. The Office of Special Investigations, Department of the Air Force, before releasing investigative files requires (1) verification of the subject of the request, and (2) review of the file for pertinence.

An example of guidelines governing the release of investigative files is set forth in DIS Regulation 20-12, "Release of Investigative Information" which is attached.

10. Q. What system of review does your agency have to determine:
1. The on-going performance of the DoD investigator?
 2. The on-going performance of review officers involved with the evaluation of investigative reports? How are these people evaluated and what system of checks exist?

A. The Defense Investigative Service is responsible for conducting personnel security investigations for Department of Defense Components. We have a system to monitor the performance of all investigators. All DIS investigative agents are required to have completed formal courses in investigative procedures and techniques. The following system of review and evaluation used by the Defense Investigative Service is typical:

a. To determine the special agents performance in conducting interviews and to enhance the basic competence and professionalism of DIS special agents, the DIS has designed a program in which letters are sent periodically to individuals who were interviewed during the conduct of a Background Investigation. The objective of this program is to receive comments and recommendations from interviewees concerning the conduct and performance of the special agent during the interview.

b. To insure proper performance and quality in the reporting of investigative information, each report of investigation written by a DIS special agent is reviewed by his field office commander and supervisory personnel at

DIS Headquarters. The accuracy, completeness, pertinence, clarity, impartiality, and conciseness of the agents completed report are considered during this review.

c. To determine the special agents overall current performance, the DIS has a system in which all DIS special agents are given annual performance evaluations by their supervisors. These evaluations serve as the basis for improving agents performance, making new assignments and promotions.

d. To assist agents in their professional growth and to insure agent performance standards are met, the DIS has published manuals, regulations, directives, etc., which provide guidance and policies concerning investigative procedures. Also, the DIS conducts investigative training seminars on a regular basis throughout its districts to insure DIS special agent personnel are kept current on investigative methods, procedures, policies, and techniques.

Persons charged with the review and evaluation of investigative reports, whether military or civilian are under the close day to day supervision of their supervisors and their performance is reviewed annually. They are selected on the basis of their maturity and demonstrated good judgment and must have been the subject of a favorable Background Investigation.

11. Q. How many people at the Department of Defense have actual or alternate access to investigatory files relating to personnel matters that are maintained there? What specific safeguards exist that prevent abusive manipulation of the files by those who may have access to them?

A. The Department of Defense is unable to provide information regarding the number of persons having access to personnel investigatory files.

With respect to the second part of this question, it can be said that such files are maintained in secure areas and separate from personnel files under continuous surveillance. They are released only to personnel having a specific need-to-know and capability to safeguard the files. (An individual's personnel security file is maintained separately

from his personnel jacket.) Activities receiving investigative reports are warned that such material may not be reproduced and further that such material shall be destroyed or returned to the owning investigative activity.

Safeguards exist to prevent abusive manipulation of files. The following DIS rules are offered as an example.

a. Data obtained during an investigation is placed on individual DIS Forms 1, Standard System Document, which makes up the report of investigation. Each DIS Form 1 contains the following restrictive legend:

WARNING

This document is the property of the Defense Investigative Service. Contents may be disclosed only to persons whose official duties require access hereto. Contents may not be disclosed to the party(s) concerned without specific authorization from the Defense Investigative Service.

b. Completed investigations are transmitted to authorized requesters of personnel security investigations via a DIS transmittal sheet which bears the following restrictive legend:

WARNING

This document and attachments, if any, are forwarded in response to an authorized request. Contents may be disclosed only to persons whose duties require access hereto. This transmittal does not constitute a denial or granting of clearance.

c. Each DIS report of investigation containing information relating to juveniles, income tax information, and certain information from banks, is annotated with a restrictive legend in addition to the legend on the DIS Form 1 (see paragraph a. above) which protects the civil and private rights of the individual. DIS Regulation 20-12 is the basic document governing the use of restrictive legends.

d. All non-DoD agencies authorized access to investigative file information in accordance with

DIS Regulation 20-12 undergo a twice-annual review of their justification.

e. Each time a DIS file is reviewed by an accredited representative of a non-DoD Executive Branch agency, the representative executes a statement of knowledge for each file reviewed.

12. Q. How much authority does the Civil Service Commission have in the regulation of investigations procedures established by the agencies? How much responsibility does each agency, the DoD in particular, have to follow the general guidelines established by the Commission?

A. Section 14 of Executive Order 10450 charges the Civil Service Commission with responsibility for implementing the Order. Section 2 of the Order clearly indicates that the head of each agency is responsible for maintaining security standards in employment practices within his own agency. Section 8(b) places primary responsibility for investigation of persons entering the competitive service on the Civil Service Commission unless the head of an agency assumes that responsibility pursuant to law or by agreement with the Commission. Section 8(c) makes the agency responsible for investigations of persons in other than the competitive service.

By agreement with the Civil Service Commission, reached in January 1954 the Department of Defense has assumed responsibility for the conduct of Full Field Investigations (Background Investigations) for critical-sensitive positions. While the Commission prescribes general standards for these investigations the agency has discretion in applying them.

13. Q. Finally, is the Department of Defense required to follow the recommendations of the Civil Service Commission Security Appraisal inspectors?

A. Executive Order 10450 Section 14a makes the Civil Service Commission responsible for overseeing implementation of the Order. The Department of Defense generally follows

the recommendations of the Civil Service Commission. The Civil Service Commission has recognized the special problems that rise out of the size and complexity of the Department of Defense and close cooperation between the Department of Defense and the Commission has been the rule and disagreements have always been resolved informally.

Should the Commission feel that the Department of Defense is not properly implementing the order and informal negotiation fail to resolve the issue, the Commission is authorized to report to the National Security Council for resolution of the problem. The Commission has never found it necessary or desirable to exercise this authority.

**EXECUTIVE ORDER 10450—SECURITY REQUIREMENTS FOR
GOVERNMENT EMPLOYMENT [AS AMENDED]**

SOURCE: Executive Order 10450, 18 F.R. 2489, Apr. 29, 1953, as amended by the following:

E.O. 10491, 18 F.R. 6583, Oct. 16, 1953; E.O. 10531, 19 F.R. 3069, May 28, 1954; E.O. 10548, 19 F.R. 4817, Aug. 4, 1954; E.O. 10550, 19 F.R. 4981, Aug. 7, 1954; E.O. 11605, 36 F.R. 12831, July 8, 1971.

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951 (3 CFR, 1949-1953 Comp., p. 748), the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and

retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947 (3 CFR, 1943-1948 Comp., p. 627), and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be em-

played by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

[Subdivision (iv) revised by E.O. 10548, 19 F.R. 4871, Aug. 4, 1954]

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Knowing membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organization) which is totalitarian, fascist, communist, subversive, or which has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means.

[Paragraph (5) revised by E.O. 11605, 36 F.R. 12831, July 8, 1971]

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

[Paragraph (8) added by E.O. 10491, 18 F.R. 6583, Oct. 16, 1953]

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

[(d) as amended by E.O. 10531, 19 F.R. 3069, May 28, 1954]

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the

case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. (a) Executive Order No. 9835 of March 21, 1947, as amended is hereby revoked.

(b) The head of each department and agency shall be furnished by the Attorney General with the name of each organization which shall be or has been heretofore designated under this order. Except as specifically provided hereafter, nothing contained herein shall be construed in any way to affect previous designations made pursuant to Executive Order No. 10450, as amended.

(c) The Subversive Activities Control Board shall, upon petition of the Attorney General, conduct appropriate hearings to determine whether any organization is totalitarian, fascist, communist, subversive, or whether it has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means.

(d) The Board may determine that an organization has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their constitutional or statutory rights or that an organization seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means if it is found that such group engages in, unlawfully advocates, or has among its purposes or objectives, or adopts as a means of obtaining any of its purposes or objectives.—

(1) The commission of acts of force or violence or other unlawful acts to deny others their rights or benefits guaranteed by the Constitution or laws of the United States or of the several States or political subdivisions thereof; or

(2) The unlawful damage or destruction of property; or injury to persons; or

(3) The overthrow or destruction of the government of the United States or the government of any State, Territory, district, or possession thereof, or the government of any political subdivision therein, by unlawful means; or

(4) The commission of acts which violate laws pertaining to treason, rebellion or insurrection, riots or civil disorders, seditious conspiracy, sabotage, trading with the enemy, obstruction of the recruiting and enlistment service of the United States, impeding officers of the United States, or related crimes or offenses.

(e) The Board may determine an organization to be "totalitarian" if it is found that such organization engages in activities which seek by unlawful means the establishment of a system of government in the United States which is autocratic and in which control is centered in a single individual, group, or political party, allowing no effective representation to opposing individuals, groups, or parties and providing no practical opportunity for dissent.

(f) The Board may determine an organization to be "fascist" if it is found that such organization engages in activities which seek by unlawful means the establishment of a system of government in the United States which is characterized by rigid one-party dictatorship, forcible suppression of the opposition, ownership of the means of production under centralized governmental control and which fosters racism.

(g) The Board may determine an organization to be "communist" if it is found that such organization engages in activities which seek by unlawful means the establishment of a government in the United States which is based upon the revolutionary principles of Marxism-Leninism, which interprets history as a relentless class war aimed at the destruction of the existing society and the establishment of the dictatorship of the proletariat, the government ownership of the means of production and distribution of property, and the establishment of a single authoritarian party.

(h) The Board may determine an organization to be "subversive" if it is found that such organization engages in activities which seek the abolition or destruction by unlawful means of the government of the United States or any State, or subdivision thereof.

(i) The Board may further determine, after consideration of the evidence, that an organization has ceased to exist. Upon petition of the Attorney General or upon petition of any organization which has been designated pursuant to this section the Board after appropriate hearings

may determine that such organization does not currently meet the standards for designation. The Attorney General shall appropriately revise or modify the information furnished to departments and agencies consistent with the determinations of the Board.

(j) The Board shall issue appropriate regulations for the implementation of this section.

[Sec. 12 revised by E.O. 11605, 36 F.R. 12831, July 8, 1971]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semi-annually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance.

[Last sentence amended by E.O. 10550, 19 F.R. 4981, Aug. 7, 1954]

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a

full field investigation under the provisions of this order, advise the Commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

[(c) added by E.O. 10550, 19 F.R. 4981, Aug. 7, 1954]

SEC. 15. This order shall become effective thirty days after the date hereof. (Date: April 27, 1953)

(3 CFR Pages 57 - 66, Proc. 3279, as amended)

DEPARTMENT OF DEFENSE
Headquarters Defense Investigative Service
Washington, DC 20314

DIS REGULATION 20-12
31 July 1973
Change 1 - 19 September 1973

Investigations

RELEASE OF INVESTIGATIVE INFORMATION

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THE INFORMATION AND INSTRUCTIONS CONTAINED IN THIS PUBLICATION ARE FOR THE INFORMATION AND GUIDANCE OF DIS PERSONNEL. DISSEMINATION OUT OF DIS CHANNELS WILL NOT BE MADE WITHOUT PRIOR APPROVAL OF THE DIRECTOR, DIS.

OPR: D0030
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31 July 1973

DISR 20-12

1. PURPOSE: This Regulation sets forth policies and procedures for the release of investigative information to organizations, agencies and officials other than the requesters of investigations.

SECTION I - RELEASE OF EXECUTIVE
BRANCH DOCUMENTS

2. INTRODUCTION: The Federal Government of the United States is divided into three branches: judicial, legislative, and executive. Each of the branches is separate and equal with respect to the power and authority granted to each by the Constitution and no branch may infringe on the authority of the others. The executive branch of the Government is headed by the President of the United States, and one of the departments of this branch is the Department of Defense. The Secretary of Defense is responsible to the President for the accomplishment of the mission of the Department of Defense.

a. The President exercises his authority for the public good. He is the sole judge as to whether or not release of executive branch documents is in the public interest. Both Congress and the Supreme Court long ago recognized that neither of them could interfere with the exercise of the Presidential authority, whether by the President or by his agents who are the heads of the executive departments. The Attorney General published a formal opinion on this matter which states the executive position on investigative reports.

"It is the position of the Department of Justice, restated now with the approval and at the direction of the President, that all investigative reports are confidential documents of the executive department and that congressional or public access thereto would not be in the public interest. This accords with the conclusion by a long line of predecessors in the office of the Attorney General and with the position taken by the President from time to time since Washington's administration; and this discretion in the executive branch has been upheld and respected by the judiciary." (Opinions of the Attorney General, Vol. 40, p. 45, 1941.)

b. Within the executive branch there is a free exchange of information between departments in order that there may be an orderly conduct of the Government's business. By custom and common understanding the investigative agencies deal directly with each other in the exchange of investigative reports and information. This procedure insures the proper safeguarding and handling of reports. In some instances this interagency cooperation is spelled out in written agreements between the agencies; e.g., the Delimitations Agreement and the Memorandum of Understanding between the Department of Justice and the Secretary of Defense concerning criminal cases.

c. In addition to the foregoing reasons, Defense Investigative Service (DIS) investigative information requires protection because of its very nature or the sources from which it has been obtained. Some DIS reports contain information the unauthorized disclosure of which could be harmful to national security. The specific controls established for the handling of DIS investigative information are for the purpose of limiting access to all such information on a strict need-to-know basis. This is necessary so as to prevent unfounded belief in allegations that are unsupported or unresolved. In addition, during the conduct of investigations it is inevitable that DIS should receive from various sources, including other Federal and local agencies as well as private sources, much information which is given in confidential relationship, and with the understanding that the information will be properly protected and kept from the knowledge of unauthorized persons. Also, as an investigative organization, we have, in many instances, a legal or moral obligation to protect the interests of individuals who are involved in specific investigative matters.

d. An integral part of the discharge of the DIS mission is the responsibility for protecting, where necessary, the identity of its informants and sources of information and for safeguarding the reputation of persons who may be unduly harmed as a result of unauthorized disclosure of investigative activity. Thus the constitutional, legal, and regulatory basis for restriction on the release of investigative information serves the public interest and prevents prejudice to law enforcement and to the agency which provides this service.

3. POLICY: A Department of Defense Directive is in progress relative to the safeguarding and release of investigative information. Pending publication of the Directive, the following policies will be observed by DIS to the extent possible.

a. Reports of investigation will not be reproduced unless absolutely necessary to carry out assigned responsibilities. All such extra copies will be destroyed as soon as they have served their needs.

b. Access may be granted to reports of investigation only to:

(1) Prepare charges for trial; prepare for official hearing or other administrative proceedings; take action to correct deficiencies or irregularities; and for security purposes, including processing of security clearances.

(2) Makes notes regarding the names and location of witnesses and the substance of their expected testimony; and prepare extracts and summaries for use in connection with court-martial, board, and other official proceedings.

c. No information that might disclose confidential investigative sources, methods, or procedures will be revealed to any person, except when specifically authorized by the Director, DIS. No such information will be disclosed to any subject or respondent, or his counsel or representative; or disclosed to any other person, without the approval of the Director, DIS, if there is reason to believe that the disclosure might compromise such confidential sources, methods or procedures.

d. An investigative report will not be introduced in evidence, or included or incorporated in any paper record of a court-martial, board, or other proceedings that the subject or respondent or his counsel or representative, or trial counsel has a right to see. Also, it will not be furnished or made available to an officer conducting an investigation pursuant to Article 32, Uniform Code of Military Justice, or to the subject or respondent in an administrative proceeding or to his counsel or representative, or to trial counsel.

e. Extracts from or summaries of an investigative report or its attachments may be prepared and released according to Section V for use in court-martial, or board, or other administrative proceeding. (See paragraph 3f for special procedures, on release of summaries and extracts of investigative reports of other investigative agencies and of reports reflecting investigative activities of other investigative or law enforcement agencies.)

f. Any document or report of investigation, or any summary or extract of it, that reflects investigative activity of any Federal, State, or local investigative or law enforcement agency and was furnished through investigative channels, will be treated, processed, and submitted for release in the manner prescribed by this regulation for reports of investigation and information except:

(1) Paragraph 17 will not apply. Prior coordination must be obtained in all instances from the producing investigative activity before releasing such material.

(2) The investigative activity will coordinate with the originator of such documents before concurring in the release.

SECTION II - RELEASE OUTSIDE THE DEPARTMENT OF DEFENSE

- * 4. GENERAL: DIS investigative reports will not be released outside the Executive Branch of the Government except as provided in paragraph 4g, below. However, DIS investigative information or reports may be released to other Executive Branch agencies according to the following rules:

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a. DIS reports contain information that is FOR OFFICIAL USE ONLY within the meaning of DoD Directive 5025.9. Therefore, the policies in that directive which require protection of such information from disclosure apply to DIS reports. No person will release a DIS report, or an extract or investigative information from it, unless such release is authorized by this directive, or has the approval of the Director, DIS.

b. The Director; Assistant Directors; Director, PICC; Director, SIC; Director, SSC; their designees, and district commanders, may approve the release of a DIS report, or an extract or summary of it, to a department or agency in the Executive Branch of the United States Government if he determines that the department or agency has a need for it, and that the release would not be contrary to law or regulation or otherwise against the public interest. Before releasing a DIS report, the releasing authority will assure himself that the report will be protected against unauthorized disclosure and access.

* c. Normally, a complete copy of a formal DIS report of investigation should not be transmitted to a civilian department, except to the FBI, unless the receiving agency has investigative responsibility by law. The general policy is to furnish extracted information of pertinent interest by letter. Even though a major portion of the report appears to be of material interest to a particular proposed recipient, unless an exception is made, per subparagraph d below, a summary will be furnished in lieu of a complete report. Accredited representatives of agencies authorized information for personnel security purposes may be allowed to review DIS files within designated DIS offices. Such files will be screened of all material not releasable under this regulation. Reviewing representatives may make notes and summaries of their own, but may not remove or reproduce documents contained in the file.

d. When DIS possesses information of certain interest to other executive branch agencies, we furnish that agency the information. In some instances, the agency has by law an investigative responsibility in the matter. Common examples are narcotics violations referred to the Department of Justice, forgery of Government obligations referred to the U. S. Secret Service, etc. The formal report may be released in such instances.

e. In the dissemination of reports of investigation or information therefrom, the releasing official will insure that the recipient has a right and need to know. He will exercise appropriate precautions to protect the identity of sources of information and classified investigative equipment and techniques. Whenever information not of interest to the intended recipient department or agency is contained in a report, a summary will be prepared furnishing only that informa-

tion of interest to the department or agency in question. Internal DIS correspondence will not be released. If correspondence contains investigative information to be released, a summary must be prepared. When furnishing summaries of DIS reports to other Government agencies as discussed in this paragraph, the summaries will be marked with the designation "FOR OFFICIAL USE ONLY," unless, of course, they bear a security classification.

f. DIS will furnish to the Civil Service Commission (CSC), copies of reports of personnel security investigations, for referral by CSC to other Executive Branch agencies for which it conducts personnel investigations.

* g. Extracts or summaries of classified or unclassified DIS investigative information may be released for the use of federal agencies outside of the Executive Branch of the government provided the agency which will use the information has a need to know. This type of release normally will be limited to information pertinent to personnel security programs. Most of the judiciary, congressional and separate agencies have contracted for investigative services from the Civil Service Commission or other investigative agencies to establish a personnel security program in consonance with EO 10450. To prevent duplicative investigative activity, it is permissible on a selective case basis for investigative information developed by DIS to be furnished such agencies upon determination by either Assistant Director. The servicing investigative agency to which a release is made will be requested not to disclose DIS as the source of the information. These instructions do not include requests discussed in paragraph 9.

h. See Section VIII for further guidance and procedures for release of investigative information to other Executive Branch Agencies.

SECTION III - RELEASE TO LOCAL AGENCIES

5. GENERAL: As used in this section, the term local agency includes state, county and city agencies in the United States. When in the course of investigation, DIS develops or receives information which is considered to be of direct interest to or within the responsibility of a local agency, the information, consistent with security regulations, will be furnished such agency. The information will be furnished orally, by letter or by copies of statements. Formal reports of investigations will not be furnished.

c. PROCEDURES REQUIRED WHEN INFORMATION IS FURNISHED: If information is furnished to local agencies in a matter which DIS is currently investigating an appropriate notation to the effect that information was furnished to the agency concerned will be incorporated into the details of the report. If the information is furnished after the

report has been written, a memorandum to the effect that oral information was furnished, or a copy of the letter which furnished the information, will be placed in the case file.

7. NONOFFICIAL AGENCIES: DIS will not release investigative information to nonofficial agencies nor to private investigative services. Requests from such agencies will be declined courteously either orally or by letter, depending on the form in which the request was made.

SECTION IV - RELEASE TO CONGRESS, BUSINESS ORGANIZATIONS,
PUBLIC NEWS MEDIA, OR PRIVATE INDIVIDUALS

8. GENERAL: Investigative reports of DIS are privileged documents of the executive branch; will not be furnished to Congress, its committees, or representatives or to the public.

9. CONGRESSIONAL REQUESTS FOR INVESTIGATIVE INFORMATION: Requests for investigative information made by individual Congressmen and by members and staffs of Congressional committees or subcommittees normally are directed to the Assistant to the Secretary (Legislative Affairs) OSD. That office channels requests to DIS where they are processed in accordance with DoD Directive 5400.4. Should a Congressional request be received directly by DIS, it will be expeditiously coordinated with Legislative Affairs, and then processed for a release determination. Congressional requests vary in nature and each must be evaluated and handled on an individual basis. Nevertheless, the following general guidelines should be observed:

a. Direct access to DIS reports is not authorized; however, a summary of an investigation may be furnished upon receipt of a written request identifying the specific area(s) of interest.

b. DIS agents may be interviewed by Congressional committee investigators after coordination with DO030. The agent must remember that expressions of opinion and rumors should be avoided and that information provided will be limited to the specific areas of interest of the requester.

c. Neither information obtained from a confidential source nor the source's identification will be revealed without the express permission of the source.

d. District commanders are not authorized to make releases of information or reports to Congressional requesters. When district offices receive Congressional requests for investigative information, the district commander will respectfully decline to provide the information and explain that the authority for release of such information rests with the Secretary of Defense. District offices will make expeditious referral to the DIS Headquarters of all Congressional requests, and the requester will be so advised. Full information concerning the request will be furnished at the time of referral. When requests are referred to Headquarters, district offices will forward copies of all pertinent material in district office files which are not known to be in Headquarters files.

e. All requests for DIS information received directly from the General Accounting Office (GAO) will be processed in accordance with DoD Directive 7650.1 and 7650.2.

10. RELEASE TO ORGANIZATIONS AND OFFICES NOT IN THE U.S.

GOVERNMENT STRUCTURE: Requests for investigative information received from a private organization or a business firm or individual, will be handled in accordance with DoD Directive 5400.7. District offices receiving requests will forward them to Headquarters DIS together with their comments and recommendations. Headquarters DIS, will determine whether the information should be released and advise the requester in accordance with DoD Directive 5400.7.

11. RELEASE TO PUBLIC NEWS MEDIA: The fostering of public relations is a command function, and the decision to release information concerning investigative matters is a responsibility of the commander who has been furnished reports of investigations conducted by DIS. All inquiries regarding DIS investigative activities will be referred to the appropriate commander to whom reports are being furnished, or his information officer. Under no circumstances will investigative information be released directly to public information media by DIS personnel. This policy does not prohibit release by district commanders of news items of local interest concerning DIS for use in base or community newspapers. The discretion of the district commander will insure that such releases do not pertain to investigative activities or other operational matters, and that disclosure of agents' grades, if inappropriate, is not made.

SECTION V - PREPARATION AND RELEASE OF EXTRACTS,
SUMMARIES AND STATEMENTS

12. GENERAL: Summaries or extracts of reports of investigation may be prepared as necessary. An extract may consist of a copy of a part of a report, or a copy of all or part of an attachment to a report, or other documentary or real evidence attached to a report. Commanders and other DoD activities may prepare a summary or extract for release to one or more of the following, depending on the circumstances and directives applicable to a particular case:

- a. An investigating officer.
- b. Trial counsel, or the legal or other adviser to a board.
- c. The subject, accused, or respondent, and his counsel or representative.

13. CONCURRENCES FOR RELEASE: Except as provided in paragraph 17 and below, before releasing a summary or extract, the DoD element preparing the summary should obtain the concurrence of the servicing nearest DIS office. This request for DIS concurrence should be in writing and

a. Enclose a copy of the summary (or summaries) to be released, as well as pertinent Reports of Investigation.

b. Identify the extracts to be released.

c. Specify the purposes for which the summaries and extracts will be used.

d. Identify the persons to whom the summaries or extracts will be made available.

14. EXCLUSIONS FROM SUMMARIES: Any summary or extract should not include:

a. Any information described in paragraph 3c.

b. Any information that may prejudice the effective conduct of any other investigation by the investigating agency or other Government agency, such as by prematurely disclosing the nature of existence of such investigation.

c. Routine administrative entries in reports, which are common to all reports.

d. The names of investigating agents or personnel except those who took statements or were witnesses to statements, or who included observations in the report based on their personal knowledge.

e. Any other information, the disclosure of which, to the person who will receive the extract or summary, would be contrary to law or otherwise against the public interest. For example, a summary or extract should not include allegations or information derogatory to the character, reputation, efficiency, or conduct of any individual whose activities are not pertinent to the proceedings.

f. Any information, the disclosure of which, to the person who will receive the extract or summary, would be prejudicial to the national defense.

15. CLASSIFIED INFORMATION: Normally, a summary or extract should not contain classified information. If an extract or summary contains classified information, it will be appropriately marked and any person given access to it must have proper security clearance.

16. FOR OFFICIAL USE ONLY: Normally, the summary or extract furnished to a subject, respondent, witness in a proceeding, or his counsel or representative, will not be marked FOR OFFICIAL USE ONLY.

17. ATTACHMENTS TO REPORTS: Attachments to a report frequently include statements of the subject and witness and exhibits pertinent to court-martial, administrative and other proceedings. In addition, the reports frequently contain summaries of oral statements made by witnesses. Before forwarding a report to the requester, the preparing DIS activity will review each statement attached to the report and each summary of a statement in the report. It will determine whether, in the event a commander initiates court-martial or other proceedings against the subject, the commander should be required to obtain concurrence of DIS before releasing those statements, or those summaries of statements, to the subject or his counsel. Appropriate entries will be made in the report concerning this. Copies of such attachments and summaries may be released to persons described in paragraph 12 above, for use in such a proceeding, without obtaining concurrence, if:

- a. The release is not prohibited by paragraph 14 above.
- b. The attachment or summary does not come within the purview of paragraph 3f.
- c. The attachment or summary is not classified or marked FOR OFFICIAL USE ONLY.
- d. In the case of a statement or a summary of a statement the report itself does not stipulate a requirement for concurrence.

18. STATEMENT OF SUBJECT: A person who has furnished a statement to DIS during an investigation may be furnished a copy of his own statement upon request, unless the report stipulates that the statement should not be released without concurrence or if the statement is classified.

SECTION VI - CLASSIFICATION STAMPS AND RESTRICTIVE LEGENDS

19. GENERAL:

a. To insure that recipients of DIS reports are made aware of the necessity for affording proper protection to the reports, restrictive legends are placed on the first page. All personnel must keep in mind the obligation to properly classify or designate information which requires protection. Even though investigative information or facts are not transmitted in a formal DIS report, the data requires protection. Content, not format, determines the need for protection. When the report contains information which affects national security as set forth in DoD Directive 5200.1R, the proper defense classification stamp is used on the document.

When the report does not contain information which requires, classification, the first page will bear the legend FOR OFFICIAL USE ONLY in the classification block. All DIS reports of investigation will be marked either with a defense classification or the designation FOR OFFICIAL USE ONLY.

b. Normally, summaries and extracts of DIS reports will not be marked with restrictive legends. These documents are prepared for eventual release to subjects, accused, respondents, and their representatives. Similarly, other attachments to DIS reports should not be marked with restrictive legends. Where release of an attachment is not to be made without prior coordination of DIS, a specific notation to that effect must be made in the body of the report. However, if the attachment requires protection under DoD Directive 5200.1R, it must be marked with the appropriate security classification.

20. RESTRICTIVE LEGEND FOR REPORTS FURNISHED TO OTHER EXECUTIVE BRANCH AGENCIES: When release of reports is made outside DoD, the legend printed on the ROI is not sufficient warning to other agencies of the executive branch. When the release to these executive branch agencies is made, the following restrictive legend will also be used: "Property of the Defense Investigative Service (DIS). This document is loaned to your agency by DIS. Distribution of the document or the information contained therein to any other agency may be made only when authorized by the Director, Defense Investigative Service."

21. RESTRICTIVE LEGEND FOR REPORTS FROM OTHER INVESTIGATIVE AGENCIES: DIS receives information from other investigative agencies outside the DoD. Generally this information is received in the form of reports prepared by these agencies; however, sometimes the information is in the form of a letter, memorandum, etc. When the information received from the other agency is in the form of a report of investigation, or summary, it may be used to accompany the DIS report as an attachment. DIS has the responsibility of affording protection to the report of the other agency. To insure that these reports are afforded proper protection, the following legend will be stamped or typed on the first page of the other agency's report:

"ATTENTION.

"This report was loaned to the DoD by another investigative agency. The report and the information contained herein will not be disseminated to unauthorized persons. Dissemination will not be made outside the DoD, nor will the information contained herein be reproduced without prior written approval of the Director, DIS. When this report has served its purpose, it will be returned to the DIS activity

which furnished it." Similarly, in each letter which transmits reports of other agencies, that is, reports received from sources outside the DoD, a statement must be included calling attention to the fact that the report is being loaned to the requester and that when the report has served his needs it should be returned to the DIS office which furnished it. When the information which has been provided by the other agency is not in the form of a report or summary which can be attached to the DIS report, the information provided will be included in the DIS report.

a. Frequently in Personnel Security Investigations information which tends to verify or disaffirm subject's education, employment, residence, etc., in foreign countries is received either through the Attache system or the cooperation of the foreign government or other government investigative agencies. The usual accepted technique in reporting such information is to state that a reliable government agency has provided the following information, etc. Since the bulk of information received under these conditions is usually not of a serious or significantly unfavorable character, there is no requirement that such information be protected by the use of the stamp set forth above in this paragraph.

b. In those instances where the information received from another agency consists of significantly unfavorable information, provided in such a manner that it must be quoted or paraphrased within the contents of the DIS report, it is necessary to afford the same protection to that information as if it were an actual attachment to the DIS report. In such a situation it is apparent that the ATTENTION stamp set forth above will not apply, as that stamp refers to the report of another agency, rather than to the DIS report itself. When this situation occurs, the following legend, which applies only in the cases described in this subparagraph, will be used. This legend should be typed on the DIS report in addition to the legend required by paragraph 20, where necessary.

"NOTICE.

"Some of the information contained in this report (cite specific portions or paragraph numbers) has been provided from sources other than the DoD. Dissemination of that information cannot be made outside the DoD without consent of the originating agency."

22. DISTRICT OFFICE AGREEMENTS FOR THE PROTECTION OF REPORTS OF LOCAL AGENCIES. Paragraph 5 defines local agencies. Paragraph 3f requires that DIS obtain concurrence from the originating agencies for the use of the contents of their reports or portions thereof to be included in summaries for release to persons listed in paragraph 12. In the interests of effective liaison and cooperation with local agencies, certain district commanders may adopt simplified procedures

for securing concurrence for release of such reports from the local agencies within the jurisdiction of their districts. Rather than to seek the local agency concurrence each time a local agency report is to be released, these commanders can accomplish a one-time agreement with those local agencies from whom they regularly receive reports. The agreement should be in written form on file at the DIS district office and should state in effect that it has been mutually agreed between the local agency and the _____ DIS District Office that such reports as they will, from time to time, furnish to DIS are furnished with the understanding that their reports are for the use of the DoD and such other Government agencies as may require them in the conduct of their official business; that unless the local agency indicates otherwise on its report, DIS has the agency's permission to disseminate and use the reports as indicated in the agreement.

23. RESTRICTIVE LEGEND USED ON COPIES OF REPRODUCED REPORTS: When copies of reports are reproduced, care must be taken to insure that the restrictive legends required are clearly legible on all reproduced copies.

24. CONTROLS OVER INFORMATION CONCERNING JUVENILES: A juvenile is any person who has not reached his or her eighteenth birthday and who was not on active duty with, nor maintained Reserve affiliation in, the Armed Forces of the United States at the time of the occurrence reported upon. For the protection of juveniles who allegedly have been involved as a victim or perpetrator in an offense or incident which is a matter of record in DIS, reports or other record material of unfavorable or limited access nature concerning juveniles will receive special handling.

25. RELEASE OF INFORMATION PERTAINING TO JUVENILES: Reports of investigation, summaries, or other documentary material containing unfavorable material concerning juveniles identified by name will be released only to DoD elements who have an action interest or to another Federal investigative agency which has shown a need for the investigative information contained in the report. In each case, when the material is released to an agency the receiving office will be advised by letter that the material contains unfavorable material pertaining to juveniles. Additionally, the lower portion of the first page of the DIS report will include the following stamped or typed legend:

"IN ORDER TO PROTECT THE REPUTATION OF PERSONS NAMED IN THIS REPORT WHO ARE OR WERE JUVENILES AT THE TIME THE MATTER DISCLOSED OCCURRED, UTMOST CARE SHOULD BE USED IN THE HANDLING OF THE REPORT."
The same procedure will apply if at the time a release is being made the individuals concerned are beyond juvenile age and unfavorable information concerning actions by these individuals when they were juveniles is contained in the material. In those instances where a

requested DIS report does not contain a precautionary statement, the foregoing legend will be affixed to the requested report as appropriate. Whenever it is practicable, an adequate summary which omits the name(s) of the juvenile(s) should be prepared. The legend will be used for all material pertaining to juveniles. Reports and files pertaining to juveniles which display legends other than the above will be altered when such material is examined for release or other disposition.

26. RESTRICTIVE LEGEND FOR REPORTING INCOME TAX

INFORMATION: Reports of investigation and letters going outside of DIS channels, which contain income tax information obtained without the taxpayer's consent must contain the following legend on the synopsis page of the report and as the last paragraph of the letter:

"The income tax information reported herein was obtained pursuant to Section 301.6103(a)--1(f), Title 26, Code of Federal Regulations. The Code provides that the information may be used as evidence in any proceeding conducted by or before any department or establishment of the United States or to which the United States is a party. Section 7213 of the Internal Revenue Code and Section 1905, Title 18, of the US Code, make it unlawful for Federal officers or employees to release income tax information to any person except as provided by law, under penalty of a fine not exceeding \$1,000, or imprisonment not exceeding one year, or both, and dismissal from office or discharge from employment."

* **27. RESTRICTIVE LEGEND FOR REPORTING CERTAIN INFORMATION OBTAINED FROM BANKS:** When reports contain information

relative to a subject's or another individual's bank account or transactions, and written permission for examination of the bank account or transaction was not given by the owner of the account, the following legend will be added to the first page of the report:

"The information contained in paragraph(s) _____ of this report, and the attachments _____ and _____, was received from a confidential source. Should this information be required for use in a court-martial proceeding or board action, it will be necessary for an appropriate authority to direct a subpoena to the bank concerned requesting that such information be made available. Such information will not be furnished to the subject or his counsel. Only the information obtained as a result of the subpoena

may be furnished the aforementioned. (NOTE: The term "and the attachments _____ and _____" will be used only when applicable.)"

The term "bank" means any financial institution which maintains custody of money or funds for its depositors. This includes such financial institutions as building and loan associations, savings and loan associations, trust companies, credit unions, and stock brokerage houses. When reporting information requiring the above restrictive legend, the following notation will also be added at the end of the appropriate paragraph or attachment in the Report of Investigation:

"The information in the above paragraph (or attachment) contains certain restrictions on its use. Note restrictive legend on the first page of this report."

As a general rule, to fulfill our moral obligation to the bank and the bank officials who have provided this information, it will not be released at any time. It will be noted that where such information is germane to court-martial, other Federal tribunals, or administrative proceedings, the legend provides that subpoena will have to be issued to obtain such information.

28. OTHER RESTRICTIVE LEGENDS: From time to time instances will arise in which other authorized restrictive legends may be required on DIS reports. DoD Directive 5200.1R contains legends concerning classified documents, and prohibitions against release of information to foreign nationals. These legends should be used when needed. However, district commanders will not originate local restrictive legends. If the need appears for a restrictive legend not provided in this section, prior approval of the Director of DIS, is required before it may be used.

29. DEFENSE CLASSIFICATION FOR REPORTS FROM OTHER FEDERAL AGENCIES: It is the responsibility of the agency preparing a document to classify it, when appropriate, under the provisions of EO 11652. When DIS receives an unclassified report or other document from an executive branch agency containing information which is known to be classified, it must be appropriately protected. In addition, the agency which originated it will be advised, through the DIS district office within those area the agency is located, of the information in the document or report which requires classification, and the

classification deemed proper. After obtaining the consent of the originating agency, the document will be so classified. Should it be necessary to disseminate the document before the originating agency has authorized its classification, the letter of transmittal will call attention to the fact that it contains information believed to warrant the classification of _____ and that the originating agency has been requested to authorize its classification. Until a final decision is reached, the report or document must be safeguarded by recipients as though it were so classified. When authority to classify it is obtained, all activities which were furnished copies will be requested to classify them accordingly. If the originating agency determines not to classify the document, the matter will be promptly referred to Headquarters DIS for appropriate action. This procedure applies equally to upgrading and downgrading of reports or other documents so received.

SECTION VII - RESPONSIBILITIES OF DIS PERSONNEL

30. GENERAL: In conducting investigations for the DoD, members of DIS assume heavy personal responsibilities. DIS personnel must always exercise caution to insure that they do not release or communicate investigative information, regardless of its source, to persons who are not authorized to receive it. This must be remembered so that unauthorized disclosures are not made inadvertently or through casual conversation in either official or unofficial situations. No person assigned to DIS has a right, as an individual, to investigative information or reports of investigation. The release of such information or reports can be made to authorized recipients only for and in the name of DIS in accordance with established procedures.

SECTION VIII - PROCEDURES FOR RELEASE OF INVESTIGATIVE
INFORMATION TO OTHER EXECUTIVE BRANCH
AGENCIES31. AUTHORIZED REQUESTER:

a. Certain agencies of the Executive Branch of the Government have a need for investigative information from the files of DIS. Agencies of the Executive Branch of the Government requesting direct and continuing access to information will be referred to DO100. That office will ascertain if such access would be in the best interest of the Government, would lead to unnecessary duplication of requests from another investigative agency, and that agency has a valid need for information on a continuing basis. (See Section II.)

b. An agency of the Executive Branch of the Government which is not currently accredited to receive information may be granted access to investigative information on a one-time basis in accordance with the following:

(1) The SIC, PICG, NACC, or higher authority, will approve the release of information to the specific agency in each instance. The particular need of that agency for the information will be considered and incorporated on the release form.

(2) The individual who actually releases the information must make a positive identification of the intended recipient, obtain the necessary receipts and certification, execute and file the release form. (This provision does not apply when the physical release is made through mail or an authorized distribution system.)

32. IDENTIFICATION OF AUTHORIZED REPRESENTATIVE:

a. Each agency authorized to receive information on a continuing basis by having an authorized representative review files, extract

pertinent information, or obtain copies of data released, will be required to furnish DO100 the name, clearance status, office telephone, and office assignment of the designated representative(s). A letter will be sent to each agency authorized to release information in the format of Attachment 1.

b. A current card file recording the data specified above will be maintained by the Investigative Files Division (DO960). In addition, DCII check will be conducted on each person being considered for liaison activities with DIS. Every six months, DO960 will require each accredited agency to submit a new accreditation list.

c. Executive Branch agency representatives, other than those recorded in the DO960 accreditation file, may receive information as indicated in paragraph 31b (1) and (2) (on other than a continuing basis).

d. In all instances, each person releasing information must assure himself that the criteria for release set forth in this regulation are met. Possession of credentials as Investigators, Special Agents, or Special Employees may be accepted as evidence that the individual is an authorized representative of the requesting agency for information classified SECRET or below. Security clearance may be determined by requiring the employer of an intended recipient to furnish proof of same directly to the Headquarters. Verification of clearance status may also be established through telephonic contact by the individual making the release with known authorities in the office of the intended recipient.

33. HEADQUARTERS DIS PERSONNEL AUTHORIZED TO RELEASE INFORMATION:

a. DO960 may release copies of reports of investigations or information in all files to Executive Branch Agencies (other than DoD Agencies for whom conducted) except:

(1) Files on DIS personnel. (The releasing authority on these files is DO003.)

(2) Information critical of DIS or another agency.

(3) Information concerning irregularities which might cause embarrassment to DoD if revealed to non-DoD agencies.

(4) Information which reveals investigative techniques or identifies confidential sources of information.

(5) Unfavorable information concerning important persons. Public personages influential in government, public affairs, groups of national importance or interest, and those persons whose present or past positions and reputation afford them special stature. The

following categories of persons are specifically included:

- (a) Elected officials of the Federal Government and key elected officials of State Governments.
- (b) Federal appointees, Congressional or Executive, occupying key positions in government including the Department of Defense.
- (c) Civilian employees of the Department of Defense (DoD) in grade of GS-15 and above.
- (d) Colonels/Captains (O-6) or higher on active or inactive duty.
- (e) Other individuals designated as important persons by Headquarters officials who are authorized to release Defense Investigative Service (DIS) investigative information.

6. Information falling in the above categories will not be released unless DO500 or DO600, or higher authority deems such release necessary. If copies of the reports are not to be furnished the requester, the OPR will prepare a summary in two copies, or provide DO960 with specific instruction for the release of information contained in the case file. The physical release of information, regardless of format (summary or copies of ROIs), will be made by DO960.

b. DIS reports in PSI cases may include reports from other DoD agencies retrieved as a part of the normal BI. These reports of other DoD agencies may be released or summarized the same as DIS reports. However, release of substantive, criminal, and counter-intelligence investigations and summaries thereof must be coordinated with the originating agency. In addition, requests for information from Army, Navy and Air Force investigative files from other than Executive Branch agencies will be referred to the preparing agency for decision on release.

c. The OPR on releases from files on DIS personnel is the Executive (DO003). Additional coordination as may be appropriate will be initiated by DO003. The requester's interest in the case file will be determined and documented at the time the request is received. Such information will assist in release determination and future reference.

d. Internal DIS correspondence other than that reporting command action only will not be released. If such correspondence contains investigative information, a summary must be prepared if a release is to be made.

34. PROCEDURES FOR PROCESSING REQUESTS FOR INVESTIGATIVE INFORMATION:

a. All requests for such information will be forwarded to D0960 for an appropriate reply or release. Information excluded under paragraph 33 above, will be forwarded by D0960 to the OPR for action. The OPR will designate all material to be released and complete DIS Form 60 (See Attachment 2).

b. When information in a pending case file is identified with the subject of a request, the requester will be advised by D0960 based on instructions from the OPR that the Subject of their request is of interest in a pending DIS investigation and that they will be furnished information pertinent to their request when the investigation is closed, unless they are already receiving reports in the matter. In these instances, it is the responsibility of the OPR to annotate the file and insure that a release is made as appropriate as soon as the investigation is closed.

c. The official authorizing the release of information must initial the appropriate block(s) on DIS Form 60 and authenticate the document by signing the correspondence space. The person signing this document is responsible for determining that he is authorized to release the information in accordance with this directive. Upon completion of release authority action, the release form and attached files will be returned to D0960 for necessary action.

d. Under certain circumstances, the OPR after reviewing a request for release and files pertaining thereto, may determine that no release is appropriate or desirable but that an oral briefing of a representative of the requesting agency may be accomplished by the OPR. In such instances, the person accomplishing the briefing will ascertain the accreditation and security clearance of the agency representative to be briefed. In each instance, DIS Form 60 will bear a notation setting forth the information which comprised the briefing: the identity of the individual who accomplished the briefing; the identity of the person who received the briefing and his employing agency; the date and reason for the briefing, as well as the identity of the official who authorized the briefing. The DIS Form 60 will be filed in the case file which served as a basis for the briefing.

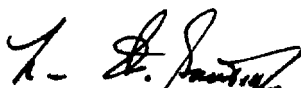
35. PHYSICAL RELEASE OF INFORMATION:

a. Each office which physically releases information from Headquarters files will comply with DoD Directive 5200.1R governing the release of classified information. All summaries containing DIS information to be released in lieu of copies of ROIs and not falling into any of the categories enumerated in paragraph 33 above will be

prepared by D0960 in two copies. One copy of the summary will be furnished to the requester and the other copy will be attached to the DIS Form 60 and filed in the case file from which the information was extracted.

b. All DIS files released for review by non-DIS personnel must be under the constant surveillance of DIS personnel and under no circumstances will DIS files be removed from DIS offices without the approval of the Director, DIS.

FOR THE DIRECTOR



MASON W. GANDY III
Colonel, USAF
Executive

3 Attachments

1. Sample Letter to Agencies
2. DIS Form 60
3. Instructions for Use of DIS Form 60

SUBJECT: Defense Investigative Service Files

TO:

1. In accordance with your request, the individuals listed in Appendix 1 have been approved as your representatives to receive investigative information from the files of the Defense Investigative Service. Requests from individuals not on the list cannot be honored. Please advise us when you desire to make any change in the list of your designated representatives and provide us with the names you wish deleted and the name, clearance status, office telephone numbers and office assignment of any added representatives.

2. While you may have received investigative information previously from DIS files or from the Military Services, we would like to reiterate the conditions under which the information is released and the protection that your agency is expected to afford the information. If the information is classified, it must be safeguarded in accordance with Executive Order 11652. In addition, we request that your agency observe the following restrictions:

a. Reports of investigation will not be reproduced unless absolutely necessary to carry out assigned responsibilities. All such extra copies will be destroyed as soon as they have served their needs.

b. Access may be granted to reports of investigation only to:

(1) Prepare charges for trial; prepare for official hearing or other administrative proceedings; take action to correct deficiencies or irregularities; and for security purposes, including processing of security clearances.

(2) Make notes regarding the names and location of witnesses and the substance of their expected testimony; and prepare extracts and summaries for use in connection with court-martial, board, and other official proceedings.

c. No information that might disclose confidential investigative sources, methods, or procedures will be revealed to any person, unless it is required in direct connection with the performance of his official duties. No such information will be disclosed to any subject or respondent, or his counsel or representative; or disclosed to any other person, without the approval of the DIS, if there is reason to believe that the disclosure might compromise such confidential sources, methods or procedures.

d. An investigative report will not be introduced in evidence, or included or incorporated in any paper record of a court-martial, board, or other proceedings that the subject or respondent or his counsel or representative, or trial counsel has a right to see. Also, it will not be furnished or made available to an officer conducting an investigation pursuant to Article 32, Uniform Code of Military Justice, or to the subject or respondent in an administrative proceeding or to his counsel or representative, or to trial counsel.

e. Extracts or summaries may be prepared as necessary. However, they should not include any information described in paragraph 2(c) above; administrative information; the names of investigating agents except those who took statements or who included observations in the reports based upon their own personal knowledge; nor any other information the disclosure of which would be contrary to law or the public interest. Such summaries or extracts will not be released to the subject or his counsel without the concurrence of the Director, DIS.

3. Your requests for information will be submitted to the Defense Central Index of Investigations (DCII), Fort Holabird, Maryland. Results of the DCII check reflecting no record or tracing to non-DIS files will be returned to your agency directly by DCII. Where the DCII check reveals a file on the subject of your inquiry, the file will be made available at Fort Holabird, Maryland for your review (or if the review is to be made at District 15 state, "at the Defense Investigative Service District Office #15 located at Tempo C, Room 2047, 2d & Q Streets, SW, Washington, D. C. 20315, telephone number (202) 693-0175/0535.")

4. As part of the review procedure, your representative will execute a statement of knowledge for each DIS file reviewed. A sample of the statement of knowledge is attached (Appendix 2). This statement will be included with each DIS file made available to your agency for review.

2 Appendixes

- A. List of Representatives (not attached)
- B. Sample Statement of Knowledge

REVIEW OF DEFENSE INVESTIGATIVE SERVICE FILE
(Statement of Knowledge)

FILE NUMBER _____ DATE _____

SUBJECT _____

As the authorized representative of the agency indicated below I have, this date, reviewed the above numbered file for the purpose of _____.

I understand that the only information contained in the Defense Investigative Service File which may be extracted, quoted, or summarized, is that which is obtained by the Defense Investigative Service from original sources. Information which is extracted, quoted, summarized or copied will be marked or stamped as follows: "THIS IS AN EXTRACT (SUMMARY) OF AN INVESTIGATIVE DOCUMENT ON FILE AT DIS. IT IS NOT TO BE TRANSMITTED TO ANOTHER AGENCY WITHOUT PRIOR APPROVAL OF THE DIRECTOR, DIS. IT DOES NOT CONSTITUTE A DEPARTMENT OF DEFENSE DETERMINATION REGARDING THE SUBJECT."

I will not divulge the contents of any files I receive to any but those having a genuine "need-to-know" for official purposes.

I will under no circumstances disclose information contained in DIS files to the subject of an investigation or to a person named therein, without specific approval of the Director, Defense Investigative Service.

I will not change, remove, or add any material to this file.

I (have) (have not) requested copies of documents contained in this file. Documents, of which copies are requested, are enumerate on the reverse side.

Representative's Signature_____
Printed or typed full name_____
Agency represented

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| INVESTIGATIVE FILE CONTROL (See Reverse Side for Instructions) | | | |
|---|--|---------------------------|--|
| SUBJECT (Indicate relationship if subject of inquiry is not subject of file.) | | REFERENCE OTHER FILE NOS. | |
| A. | | B. | |
| RELEASING AUTHORITY (READ DOWN) | | | |
| INDICATE APPROPRIATE RELEASE INSTRUCTIONS AS FOLLOWS: (Use space below for special instructions) | | | |
| 1 - RELEASE. A-COPIES OF ALL ROIS. B-COPIES DIS ROIS ONLY. C-SERIALS INDICATED. C-ATTACH SUMMARY MEMO. | | | |
| 2 - REPLY. A-NO DATA IDENTIFIABLE WITH SUBJECT. B-NO INFORMATION PERTINENT TO REQUEST. C-NO INFORMATION DEGRATORY TO SUBJECT. D-ENTIRE DIS LIFT PREVIOUSLY FURNISHED. | | | |
| 3 - REFER AS INDICATED IN INSTRUCTIONS BLOCK BELOW. | | | |
| C. AGENCY FOR | | | |
| D. AGENCY FILE NO | | | |
| E. INSTRUCTIONS | | | |
| F. RELEASING AUTHORITY | | | |
| G. RELEASING OFFICIAL | | | |
| H. DATE RELEASED | | | |
| SPECIAL INSTRUCTIONS: | | | |
| FILE NO. | | | |

DIS FORM 60
JUL 73

Attachment 2

Instructions for Use of DIS Form 60

1. Completion of form: (Refer to Attachment 2 for corresponding alphabetical designations.)

BLOCK "A" (SUBJECT): This block to be filled out by DO960.

BLOCK "B" (REFERENCE): To be filled out by DO960 based on "hits" received from DCIL. If the referenced file contains no information pertinent to Subject or if the information is included in another file, a notation to that effect will be made.

BLOCK "C" (AGENCY): To be filled out by DO960.

BLOCK "D" (AGENCY FILE NO): To be filled out by DO960 when requesting agency file number can be determined.

BLOCK "E" (INSTRUCTIONS): To be accomplished by Offices of Primary Responsibility (OPRs) or in DO960 utilizing codes as set forth in the "1-RELEASE," "2-REPLY" portions of the form. Additional instructions if required will be noted on the lower portion of the form or on the reverse side.

When a "Previously Furnished" reply can be given without referring the file to an OPR, DO960 will take immediate action and so notify the requesting agency, citing date of prior release and agency file number, if known, without making any notations whatsoever on the form. (A properly completed column should already be filled in on the form, or on any previous form, reflecting the prior release will be in file).

BLOCK "F" (RELEASING AUTHORITY): Self-explanatory.

BLOCK "G" (RELEASE OFFICIAL): To be accomplished by Release Agent personnel in DO960 at the time the file is made available to the requesting agency.

BLOCK "H" (DATE RELEASED): Self-explanatory.

BLOCK "I" (FILE NO): To be filled in by DO960 personnel when individual files are booked in volumes, or, by reviewers in DO960 at the time of the first release.

2. Inserting form into file:

a. This form will be inserted under the Retention Control Sheet of the file to which it pertains.

DEPARTMENT OF DEFENSE
Headquarters Defense Investigative Service
Washington, DC 20314

Change 1
DIS REGULATION 20-12
19 September 1973

Investigations

RELEASE OF INVESTIGATIVE INFORMATION

DISR 20-12, 31 July 1973, is changed as follows:

1. Page Change

Remove

Insert

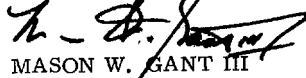
✓ Cover Page and ii

Cover Page through iii

2. This change establishes a "For Official Use Only" designation for the regulation and adds a restrictive legend.

3. After posting the change, file this sheet in the back of the regulation.

FOR THE DIRECTOR


MASON W. GANT III
Colonel, USAF
Executive

THE INFORMATION AND INSTRUCTIONS CONTAINED IN THIS
PUBLICATION ARE FOR THE INFORMATION AND GUIDANCE OF DIS
PERSONNEL. DISSEMINATION OUT OF DIS CHANNELS WILL NOT
BE MADE WITHOUT PRIOR APPROVAL OF THE DIRECTOR, DIS.

OPR: D0030
DISTRIBUTION: DWWXX

DEPARTMENT OF DEFENSE
Headquarters Defense Investigative Service
Washington, D.C. 20314

CHANGE 2
DISR 20-12
20 May 1974

Investigations

RELEASE OF INVESTIGATIVE INFORMATION

DISR 20-12, 31 July 1973, is changed as follows:

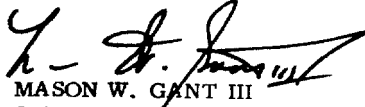
1. Page Change

Remove
✓ 3 & 4
✓ 5 & 6
✓ 13 & 14

Insert
3 & 4
5 & 5a
6
13 & 14
14a

2. After posting the change, file this sheet in the back of the regulation.

FOR THE DIRECTOR


MASON W. GANT III
Colonel, USAF
Executive

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OPR: D0030
DISTRIBUTION: DWWXX

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330

OFFICE OF THE SECRETARY



JUN 4 1974

Dear Mr. Chairman:

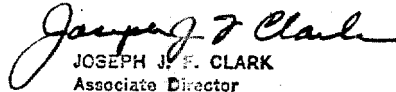
Your letter to the Secretary of Defense dated April 25, 1974, in regard to testimony before the Subcommittee by Mr. A. Ernest Fitzgerald, has been referred to the Air Force for direct reply.

As has been explained on a number of previous occasions, in the judgment of the responsible officials, the inquiry in mid-1969 was considered to fall within the scope of the authority vested in the investigative agency to conduct a preliminary evaluation of allegations received. The inquiries were strictly job-related, had absolutely no bearing on the decision to separate the employee and, in fact, came to nothing. So far as can be determined, no "evidence" of any kind was destroyed, only the results of certain permanent records checks, which had proved negative. The quotation from the 1973 appeal refers not to this issue, but rather, to an extant memorandum which was omitted from the file when the materials were made available for congressional examination. This occurred after the decision and was evidently due to administrative oversight in the transmission process.

It must be stressed that this file, which has been closed for almost five years, has not at any time operated to the prejudice or detriment of the employee. On the contrary, the outcome was to clear him of conflict-of-interest allegations reported to the investigative agency as required by applicable regulations. To protect the individual's right of privacy, such matters are not publicly released unless, as here, the employee specifically so requests.

We appreciate the opportunity to clarify these points.

Sincerely,



JOSEPH J. F. CLARK
Associate Director
Legislative Liaison

Honorable Jerome R. Waldie
Chairman, Subcommittee on Retirement
and Employee Benefits
Committee on Post Office and Civil
Service
House of Representatives

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

MAY 24 1974

Honorable Jerome R. Waldie
Chairman, Subcommittee on Retirement
and Employee Benefits
Committee on Post Office and
Civil Service
406 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Waldie:

This is in reply to your letter on the testimony of Brigadier General Joseph Capucci given at the Civil Service Commission hearing on the appeal of Mr. A. Ernest Fitzgerald.

During the course of his testimony, General Capucci stated that there were destroyed written information and comments favorable to Mr. Fitzgerald which would have laid to rest derogatory information received by General Capucci in the course of an investigation of Mr. Fitzgerald. You point out in your letter that in its decision to restore Mr. Fitzgerald the Commission said of the failure of the Air Force to retain favorable information:

"We find it unconscionable for OSI to have shown only the derogatory allegations without also showing the results of the investigation which laid to rest these allegations."

You ask what effort the Commission has made to prevent the destruction of information of this kind from occurring again, and what effort the Commission has made to call General Capucci to account for his conduct.

The authority of the Civil Service Commission is limited to civilian employees of the Government. It has no authority to prescribe regulations governing the conduct of members of the armed forces or to take disciplinary action against them. Neither does it have authority to review action taken against them by their departments. Since General Capucci is a member of the Air Force, any effort by the Commission to direct the Air Force to call him to account would be in excess of its authority.

With respect to the Commission's authority to prevent the destruction in an agency of favorable or exculpatory information affecting a civilian employee, the Commission most effectively prevents agency abuses of that kind by the exercise of its appellate authority to reverse agency action when it appears that the action taken impacted adversely on the employee's rights.


Although the Commission has no power to direct agencies in their day-to-day treatment of individual civilian employees, the employees, in many cases, have a right to appeal to the Commission for a review of agency action against them. The Commission has vigilantly guarded the integrity of its procedures, and it is not reluctant to reverse agency action whenever it discovers in any case appealed to it that an agency failed to accord an employee his procedural or substantive rights. The decision in Mr. Fitzgerald's case is an example of the Commission's reaction to agency action tending to undermine the integrity of its processes by the destruction or suppression of information the employee is fairly entitled to. The Appeals Examining Office apparently gave effect to the well established principle that when a party fails to produce available evidence, or destroys or spoils it, a presumption or inference arises that such evidence would have been favorable to the other party. It also prevented the agency from purportedly using the reduction-in-force mode of removal, which is subject to only limited procedures and review, when its true intent was a dismissal for cause which is subject to close review. Reversal by the Commission of agency action taken in disregard of employee rights has proven to be an effective preventive against similar arbitrary action in other cases.

Another avenue for correction of abusive treatment of employees lies in the evaluations conducted by personnel of the Bureau of Personnel Management Evaluation of the Commission. Literally hundreds of these evaluations of agencies are conducted each year, under circumstances where the Commission's presence is made known to all, so that union representation and individual employees as well are made aware that they can speak in confidence to Commission personnel about complaints of all sorts. While these evaluations are conducted principally to achieve systemic correction of agency performance in personnel management, we do take occasion to follow up on individual complaints in order to resolve them. I am informed that complaints of the malicious destruction of the favorable portions of investigative reports are seldom, if ever, raised.

The only copy we have of the transcript of General Capucci's testimony given at the Commission hearing of Mr. Fitzgerald's appeal is that which is part of the Commission's file of the case. We are enclosing a xerographic copy of it. The address of the official reporter, Hoover Reporting Company, Inc., appears on the cover sheet of the copy we are sending you.

I appreciate the opportunity to comment on the questions you raise, and to draw the distinction between civilian and military personnel with respect to the Commission's authority in matters of this kind.

Sincerely yours,


Robert E. Hampton
Chairman



LAW DEPARTMENT
Washington, DC 20260

April 8, 1974

Dear Mr. Chairman:

This is in reference to H.R. 13038, a bill "To amend title 5, United States Code, to protect civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights, to prevent unwarranted governmental invasions of their privacy, and for other purposes", currently under consideration by your committee. A related bill, S. 1688, has been transmitted to your committee after its passage by the Senate. Although the Postal Service has not been requested to report on H.R. 13038, we think we should advise your committee that the bill as drafted would not apply to the Postal Service.

H.R. 13038 would enact a new subchapter III of chapter 71 of title 5, U.S. Code. Chapter 71 applies to the Postal Service in its unamended form under the terms of 39 U.S.C. §410(b)(1). However, the application of this new subchapter III to the Postal Service would be barred under the canon of statutory construction that subsequent amendments to specifically incorporated statutes do not affect the incorporating statute. 2A Sutherland, Statutes and Statutory Construction §51.07 (4th ed. 1973). If it is the wish of the committee to apply H.R. 13038 to the Postal Service, the bill should be amended by the insertion of a specific reference to the Postal Service. However, we feel that application of the bill in its entirety to the Postal Service would significantly undermine collective bargaining between postal management and organizations of postal employees.

In general, the Postal Reorganization Act patterned labor-management relations in the Postal Service after those existing in the private sector of the economy under the National Labor Relations Act. Chapter 12 of title 39, U.S. Code, provides for the establishment and recognition of exclusive bargaining units of postal employees and for the negotiation

of collective-bargaining agreements between these bargaining units and postal management. In addition, 39 U.S.C. §1206(b) states that these collective-bargaining agreements may include procedures for resolving grievances and adverse actions arising under the agreement. Accordingly, the July 20, 1971, and July 21, 1973, agreements between the Postal Service and the national postal craft unions have included grievance procedures (Article XV) which afford a speedy means, culminating in binding impartial arbitration, of resolving employee grievances and appealing disciplinary actions. These procedures contemplate that an employee will be represented in grievance and adverse action proceedings by the exclusive bargaining representative recognized for his bargaining unit pursuant to 39 U.S.C. §1203. In addition, non-bargaining-unit employees of the Postal Service, although not covered by the provisions of the collective bargaining agreement, have available to them procedures by which they may pursue a grievance or appeal an adverse action to higher levels of postal management.

Thus, in our judgment, the collective bargaining agreement currently in force between the Postal Service and the national postal craft unions contains ample machinery to protect postal workers against the management activity which H.R. 13038 would proscribe. The actions prohibited in proposed §7173(a) of H.R. 13038 could be challenged under broad language establishing the grievance procedure under the agreement. The following is the broad definition of "grievance" as contained in the agreement:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

So that the established system of postal labor relations may continue to operate successfully, the Postal Service recognizes as a fundamental premise of its labor relations that the full range of possible differences between postal workers and postal management be resolved through procedures established in collective bargaining.

If H.R. 13038 were amended to apply to the Postal Service in its present form, its procedures would splinter the existing machinery for protecting the rights of postal employees. Establishing an essentially duplicative set of administrative procedures for enforcing employee rights outside the bargained-for contract provisions would exacerbate the multiple-appeal problems which already complicate postal labor relations,^{1/} and would encourage the filing of additional collateral challenges to management actions which should properly be judged under the procedures of Article XV of the collective bargaining agreement. In addition, allowing an employee organization other than the collective bargaining agent to intervene in actions on behalf of an aggrieved bargaining unit employee under proposed §7174(g) and 7175(f) of the bill would blur the established labor relations policy under which the exclusive bargaining representative may represent an employee in a grievance proceeding. Departure from this principle might ultimately turn employees' privacy proceedings into clashes between rival unions and foment instability in postal labor relations.

It is essential to continued good labor-management relations in the Postal Service that postal employees continue to look to collective bargaining, rather than to regulatory agencies outside the Postal Service, for protection against improper management actions. Accordingly, we would oppose any amendment applying this bill to the Postal Service which did not also assure that the bill's provisions would not undermine collective bargaining between postal management and organizations of postal employees.

We do not object to the creation of the substantive employee rights set forth in proposed §7173(a) of H.R. 13038. However, we feel that the application of the procedural provisions of the bill to postal employees covered by a collective bargaining agreement is unnecessary and would undermine the effectiveness of the employee grievance procedures already established through collective bargaining. Therefore, if the Committee

^{1/}
Proposed §§7174 and 7175 of H.R. 13038 would add a proceeding before the Board on Employees' Rights, followed by judicial review, to the present remedies afforded a postal employee, who may concurrently challenge management actions with a grievance under the collective-bargaining agreement, an EEO complaint, an NLRB charge, and, in adverse action cases, a veteran's appeal to the Civil Service Commission.

decides that it is advisable to apply this measure to the Postal Service, we would suggest the addition of the following section to the bill:

SEC. 4.

(a) Section 410(b) of title 39, United States Code, is amended by replacing the words, "section 3333 and chapters 71 (employee policies) and 73" with the words, "section 3333 and subchapters I and II of chapter 71 (employee policies), chapter 73".


(b) Section 1005 of title 39, United States Code, is amended by adding the following subsection:

"(g) The provisions of subchapter III of chapter 71 of title 5 shall apply to officers and employees of the Postal Service, except that sections 7173(c), 7174, 7175, and 7176 of title 5 shall not apply to any employee covered by a collective bargaining agreement negotiated pursuant to chapter 12 of this title."

Addition of this language would grant to all postal employees the substantive privacy rights afforded by the bill, but would exclude from the procedural provisions of H. R. 13038 all postal employees covered by a collective bargaining agreement.

The Postal Service would have no objection to the enactment of H. R. 13038, if amended as suggested.

Sincerely,


Louis A. Cox
General Counsel

Honorable Jerome R. Waldie
Chairman, Subcommittee on
Retirement and Employee Benefits
Committee on Post Office and
Civil Service
House of Representatives
Washington, D. C. 20515

STATEMENT OF CONGRESSMAN RICHARD H. ICARD
ON H. R. 1281 and SIMILAR BILLS,
BEFORE THE SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS
(Committee on Post Office and Civil Service)

Chairman Waldie and Members of the Subcommittee:

Chairman Waldie has informed me that Senator Ervin has sponsored legislation having as a stated purpose the protection of Federal employees against alleged invasions of their privacy and that similar bills have been introduced in the House, including H. R. 1281, introduced by Mr. Wilson, which had been referred to this subcommittee. He asked me to testify in connection with the consideration of this bill (H.R.1281) and others like it, namely, H. R. 856, H. R. 1125, H. R. 1579, and H. R. 2064. I thank you for this opportunity to present my views with regard to these measures.

As you may know, on reference to the Committee of two prior Senate-passed bills, S. 782 of the 91st Congress and S. 1438 of the 92nd Congress, introduced by Senator Ervin, which were predecessor bills of S. 1688 introduced by him in the 93rd Congress, I had expressed strong opposition to the Ervin bills in correspondence with the Chairman and Members of the Subcommittee on Manpower and Civil Service which at that time had these measures under consideration.

The bill H. R. 1281, and similar bills introduced in this Congress, appear to be modified versions of the earlier bills introduced by Senator Ervin. While it seems to me that H. R. 1281 is a vast improvement of the earlier and later efforts of Senator Ervin, it is still, in my opinion, subject to serious objections. I therefore oppose such measures, at least in their present form. For convenience of reference I shall relate my remarks to the provisions and pagination of H. R. 1281.

Of course I support in principle the policy expressed in section 7171 of the bill, and I am generally in accord with the view that limitations should be recognized by administrative personnel in relation to the areas of inquiry with which the bill treats in section 7173. But it is likewise evident that, at least within recent years, the need for such limitations has been fully recognized in executive regulations. No doubt this action has, in large part, been prompted by expressions of congressional concern. Nevertheless, it does not appear that there are presently any serious problems on subjects encompassed by the bill. The present restrained program, applied by the executive agencies, would not seem to justify the legislative action proposed. (See the attached responses which have been made to my inquiry by the General Counsel of the Civil Service Commission and the Department of Justice, dated respectively June 27 and August 21, 1973, attached hereto and marked Exhibits A and B.)

Apart from the question of necessity for legislation upon these subjects, I am not in accord with the rigid approach taken by this bill in its endeavor to control the exercise of executive discretion. In its present form section 7173 endangers and subverts important policy considerations in the maintenance of the integrity of the Federal Civil Service and would unduly obstruct the Executive in its duty to protect the civil service against the incursions of foreign agents, disloyal persons, the mentally ill, homosexuals, racists, and other unsuitable persons. Despite the exceptions which the bill endeavors to spell out, the bill's inflexible prohibitions upon inquiry would impair the operation of the Federal civilian employee loyalty, security, and suitability screening programs now maintained pursuant to law and regulations. It also trespasses upon the President's constitutional appointing power.

In view of the threat posed by the bill to the effectuation of the above mentioned vital governmental programs, there must be some positive recognition of the need for a more reasonable balancing of the equities between the public right to know and the individual's personal interest in maintaining the privacy of his past conduct. The public right on the one hand, and the individual's private interests on the other, ought not to be wholly weighted on either side. The public interest must be equally asserted and, to that end, it must be realized that, to the extent necessary to respond to this interest, an individual who seeks governmental—that is, public—employment must in some degree, and for such purposes, be held by his action, in entering the public domain, to have shed his cloak of privacy.

I am, moreover, unequivocally opposed to the provisions of sections 7174 through 7176. They erect a wholly unnecessary and wasteful apparatus in the creation of a so-called Board on Employee Rights and confer a monstrous power upon the Federal Judiciary which in the expansion of its authority to intrude upon the executive can have no other tendency than to intimidate the vast body of efficient, dedicated, and responsive Federal administrators and thus tend to immobilize the administration of the business of Government. In the following, I shall be more specific.

PARAGRAPH (1), SUBSECTION(a), OF SECTION 7173

First, I direct your attention to paragraph (1), subsection (a) of section 7173, at page 2, line 16, of the bill. This paragraph would prevent inquiry into an applicant's "race, religion, or national origin," with certain exceptions. It apparently operates on the assumption that an individual might be embarrassed by such inquiries, or that they might possibly result in some invidious discrimination that will be practiced upon him by reason of the disclosures. Nevertheless, it makes no allowance for the interest of the Government in ascertaining the identity of particular individuals and facilitating the conduct of investigations to ascertain their suitability for

employment in positions both non-sensitive and sensitive (the latter embracing "national security" aspects as such words of art are now commonly understood). The exceptions to prohibited inquiry do not include one of major significance, that of ascertaining an individual's identity in relation to such matters as arrest records or activities of a subversive or criminal nature in which he may have engaged and which are relevant and necessary to determine his suitability for employment in accordance with the requirements of law and executive orders.

The exception provided in sub-paragraph (B), which is confined only to inquiries concerning "national origin," when the inquiry is considered necessary or advisable to determine an individual's suitability for assignment to activities related to the national security, etc., is obviously not adequate to relieve the prohibition of the objection. Moreover, I direct attention to the fact that the term "national security" has come to be a word of art and has, at least in employment aspects, been related to "sensitive" positions only. See *Cole v. Young*, 351 U.S. 536 (1956), and the report of the subcommittee of the Committee on Internal Security, "The Federal Civilian Employee Loyalty Program," House Report No. 92-1637.

There are other objections to the prohibitions imposed by paragraph (1), of subsection (a), which serve to emphasize what I have previously indicated that when we endeavor to go beyond more general expressions of policy, without leaving to the Executive the details of implementation, or according to it some measure of discretion, we inevitably run into the almost insuperable problem of endeavoring to spell out exceptions for every conceivable situation. It is to be observed, for example, that the flat prohibition upon inquiry into race and national origin may seriously interfere with expressed Federal policy which has a purpose of enlarging opportunity for the employment of blacks and, also it seems, of other ethnic groups, Spanish-surnamed or Indian, with a view toward achieving their more balanced representation in Federal employment. If such inquiry is to be prohibited, it is evident that there will be some difficulty in carrying this policy into effect.

In addition, I am not certain that the prohibition upon inquiry into "religion" will not have serious adverse consequences in certain instances where a particular religion is of such character as to be clearly relevant to an individual's suitability for employment. I am referring to religions which have clearly defined anti-social and anti-Government objectives, such as the Black Muslims, and other religious groups which, for example, teach and advocate the propriety of the use of drugs and even of making human sacrifice, a subject which I hereinafter treat more fully in my observations regarding the prohibitions upon inquiry into religious beliefs or practices as provided in paragraph (4).

SUBPARAGRAPH (B), PARAGRAPH (3), SUBSECTION (a), OF SECTION 7173

Second, I am particularly disturbed with the possibly disastrous effect which the provisions of sub-paragraph (B), of paragraph (3), at page 4, commencing at line 21, may have upon the loyalty and security programs maintained pursuant to E. O. 10450 and Civil Service regulations. This provision prohibits an executive agency from making inquiry into, or any report or response concerning, "any activity or undertaking of the employee not involving his official duties," with certain exceptions. It is clear to me that your objective in this clause is a very worthy objective of prohibiting any executive agency or officer from intruding upon an individual's private life unrelated to, and not affecting the performance of, his official duties. However, in seeking to protect this legitimate interest the bill has, I believe, totally overlooked, and has not provided for, the legitimate interest of the Government in protecting itself against disloyal or dangerous employees. As presently worded, and despite the exceptions provided, this provision would appear to prevent inquiry of an employee of any of his activities, whether indulged in during duty hours or on off-duty hours, that may be subversive in character or in furtherance of his activities and associations with subversive organizations, including but not limited to Klan-type groups. It will not be practicable in most instances to prove that such activities are within the language of your specific exception, "conflict with, or adversely affect the performance of, his official duties." Yet such activities are properly the subject of investigation under existing laws and executive orders. Indeed, to preclude the Government from exploring the subject would even foreclose the employee from making a reasonable explanation of his involvement when the Government is in possession of such information from other sources. In that respect the employees' rights, as well as the Government's, could be impaired rather than advanced. I therefore think that an exception should be specifically noted, permitting such inquiries and requiring reports of activities relevant to determining the individual's suitability for retention in employment on loyalty and security grounds in accordance with the standards and requirements of existing law, executive orders, and agency regulations.

PARAGRAPH (4), SUBSECTION (a), OF SECTION 7173

Third, paragraph (4), at page 5, line 8, would prohibit the Government, in certain instances, from making significant inquiries concerning the applicant's or employee's suitability for employment on loyalty and other grounds of vital interest to the Government. The restraints imposed by this paragraph relate to three areas of inquiry: (1) personal relationship with any individual related by blood or marriage, (2) religious beliefs or practices, and (3) attitude

or conduct with respect to sexual matters. While I am fully in accord in principle that there should be some limitation upon inquiry in each of these areas, I am not in accord with the theory that there should be a flat prohibition of all inquiry under all circumstances. The exceptions to this prohibition are not adequate to protect vital governmental interests. I would like preliminarily to analyze the three exceptions contained in the three subparagraphs, commencing at page 5, line 18 and following, designated (A), (B), and (C):

Subparagraph (A) makes exception of all of the aforementioned three areas of inquiry when conducted by "a physician" to enable him to determine whether or not the employee or applicant is suffering from "mental illness." This clause is so drafted that it would appear that these inquiries cannot be conducted by an executive agency through a physician of its own choosing. Nor does it appear that an executive agency could compel response as a condition for employment even in cases where the employing agency would have reason to believe that the applicant or employee was obviously suffering from a mental illness. Only "a physician" may elicit this information or authorize these tests. Presumably, the language of the provision restricts the inquiries to a physician of the applicant's or employee's own choice, and even precludes an agency from establishing a regulation on the subject. It is absurd and unwise to prohibit inquiries in cases where there might be an obvious basis for them, or, in less obvious cases, but where a question arises, to prohibit an employing agency from requiring either submission to tests or response to questions to determine the individual's suitability where a question of mental illness is involved.

Subparagraph (B) makes exception only on one of the subjects of inquiry, and that is with respect to sexual misconduct. This limitation, however, would appear to be unnecessarily stringent. It permits the inquiry into sexual misconduct only when the agency comes into possession of information to that effect independently of any prior inquiry or admission by the employee or applicant. Employing agencies could possibly live with this limitation in relation to those Federal positions commonly designated as "critical-sensitive" as to which full field investigations are required and which are likely to provide a source of information for the executive agency. Such positions however embrace only about 5% of the entire Federal service. But with respect to other positions, about 95% of the service, as to which full field investigations are not required, it is not likely that the agency will obtain this information as a basis for inquiry. Hence it seems to me that some inquiry on this subject should be permissible. For example, there are even some obvious cases where it would not seem to me too much to require an applicant to respond to a direct question, such as, "Are you a homosexual?" If the executive agency then has no basis for further inquiry, I would agree that no further inquiry should be permissible. As you

know, recent studies in this field suggest the prevalence of this perversion to be upon a larger scale than previously thought, which would appear to justify some inquiry in the circumstances I have noted. See also Senate Document 241, 81st Congress, 2nd Session, titled "Employment of Homosexuals and Other Sex Perverts."

Subparagraph (C) makes exception to one area of inquiry only, and in this instance to questions concerning the personal relationship of the employee or applicant with any individual related to him by blood or marriage. Inquiry is permissible under this provision when the official of the employing agency considers the information necessary "in the interest of national security." I am particularly concerned about the limitation of inquiry on this subject, despite the "national security" exception.

In Senator Ervin's present bill, S. 1688, as was the case in his earlier bills, no similar exception on "national security grounds" was made to the prohibition on inquiries on this particular subject. I objected to his earlier bills on this basis, among others, and in this connection I had written to Chairman Henderson and Members of his Subcommittee on Manpower and Civil Service which had the measures under consideration. I said that the provision of the bill—

would prohibit relevant inquiries in security investigations, particularly in instances where the person's relatives by blood or marriage have engaged in subversive activities or membership in subversive organizations, or reside behind the "Iron Curtain," and may subject him to blackmail or coercion. This section, if in effect at the time of the investigation of nuclear physicist Oppenheimer, would, for example, have seriously affected the investigation. You will recall that Oppenheimer's brother and wife had been members of the Communist Party and were deeply involved in atomic espionage for the Soviet Union, a critical factor in revoking his security clearance.

On the other hand, while the "national security" exception, which has been written in the bill H. R. 1281, would relieve the provisions of paragraph (4) of this objection regarding "security" investigations, it would not do so with respect to "loyalty" inquiries and other inquiries of relevance to the individual's suitability for employment on other than strictly "national security" grounds as that expression is now understood. Moreover, the exception is limited only to inquiries in the area of personal relationship to individuals related by blood or marriage and does not extend to inquiries in the area of religious beliefs or practices, or with respect to sexual matters. I shall expand upon this point in subsequent matter, but in order fully to understand my objection to the limitation expressed in the concept of "national security," it is perhaps desirable to digress or enlarge

upon this concept of "national security" which has come to have a very special and limited meaning in practice.

In Cole v. Young, supra, to which I have hereinbefore referred, the court had to construe the statutory language of the Act of August 26, 1950, which is similar to that employed in the bill. The Act authorizes the suspension or dismissal of employees when deemed necessary "in the interest of the national security." In construing this language, the Supreme Court held that it related only to positions within the Government which are "sensitive," that is, sensitive in the interest of national security, and that the term "national security" was intended to comprehend "only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."

The terms "national security" and "security" investigations have become words of art. They have in practice been related only to national defense activities and positions according access to information classified on national security grounds. Yet there are a host of positions which are indeed sensitive on other grounds in the national interest, in relation to persons, for example, who occupy places or positions of proximity to persons who do have access to classified information or its preparation, or have access to information affecting life, property, or the mission of an agency, including restricted information identifying covert informants in aid of investigations not related to the national security, such as narcotics investigations, or occupy supervisory positions in Government which could seriously affect the execution of vital Government policies not directly related to the national security but to the Nation's general welfare. These questions have been fully explored in the Preyer report, a report of a subcommittee of the Committee on Internal Security, titled "The Federal Civilian Employee Loyalty Program," House Report 92-1637. It is worthwhile, I believe, to review this report in light of the problems here in issue.

It is becoming increasingly apparent that the concepts of "loyalty," "security," and "suitability," although overlapping in varying degrees, are not identical concepts. They convey significant differences in meaning and consequences. The concept of "security" embraces the "loyalty" concept. On the other hand, the concept of "loyalty" is not necessarily limited to the concept of "security" or "national security." A disloyal person is undoubtedly a "security risk." Yet all security risks are not disloyal persons. An individual committed to the destruction of the system of Government we enjoy must be regarded as a disloyal person. He is also a security risk, because it would be unwise and unsafe to entrust him with the secrets of the Nation or to place him in any position in which he could adversely affect the defense of the

Nation, or do any grave injury to its economic, political, or social structure. On the other hand, an individual who has no such commitment but has some bad habits, such as addiction to alcohol, or loose talk, for example, or whose character has been sullied or debased by criminal associations other than those of a treasonable or subversive nature, cannot be classified as disloyal but may fall within the category of "security risk."

The loyalty factor is thus relevant to all positions in Government, while the security factor is confined to activities or positions which more directly affect the security of classified information or the defense of the Nation. Loyalty is a factor necessarily included in the security question, but all security factors are not embraced within the loyalty concept. On the other hand, the concept of "suitability" is of broadest import and has been more generally applied to all factors affecting an individual's fitness for Federal employment without limitation to the narrower concepts of "security" and "loyalty," although embraced within it. Present "suitability" regulations of the Civil Service Commission include the following bases for disqualification for employment in all positions:

- (a) Dismissal from employment for delinquency or misconduct;
- (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;
- (c) Intentional false statement or deception or fraud in examination or appointment;
- (d) Refusal to furnish testimony as required by § 5.3 of this chapter;
- (e) Habitual use of intoxicating beverages to excess;
- (f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
- (g) Any legal or other disqualification which makes the individual unfit for the service.

Executive regulations, particularly E. O. 10450, require that investigations be conducted of all applicants for Federal employment to determine whether or not their employment or retention in employment is "clearly consistent with the interests of national security." It is provided that the investigations shall develop information on subjects similar to that applied in the suitability regulations of the Civil Service Commission, including as well other loyalty and security factors which, inter alia, are specified as follows:

- (2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

In summary, we may relate the foregoing analysis and considerations to the restraints on inquiry imposed in paragraph (4) as applied to each of the three specified areas of inquiry, which have the following consequences despite the exceptions provided in the bill in subparagraphs (A), (B), and (C):

(1) The effect of the prohibitions of the bill on the first area of inquiry, the applicant's or employee's personal relationship with an individual related to him by blood or marriage, would be to preclude all inquiry into loyalty and other suitability factors to which such a personal relationship may be relevant or may furnish significant evidence, and would thus seriously impair the administration and execution of existing programs for determining an individual's suitability for Federal employment on other than "national security" grounds.

(2) The bill would prohibit all inquiry into "religious beliefs or practices" without any exception whatsoever. While this is a delicate area of inquiry and any authority to inquire on the subject should be discreetly exercised, it is nevertheless a fact that there are some "religious" beliefs and practices which are not conventional and which should clearly disqualify an individual in certain instances for Federal employment.

The Federal Judiciary, for example, has declared the Black Muslims to be a religious sect. Yet, it is clear that an individual committed to the beliefs or teachings of that religion may be grave security and suitability risks in Federal employment. Inquiry of adherents of that faith may be necessary to determine their eligibility for Federal employment. J. Edgar Hoover has characterized the Nation of Islam (Black Muslims) as an "all-Negro, violently anti-government and anti-white organization," and further said that it was "a very real threat to the internal security of the Nation." The sect has frequently been involved in litigation. In one instance, Wilson v. Prasse, 463 F. 2d 109 (1972), the Third Circuit had before it the question of restraints on the distribution of Muslim literature among the prison population. The court observed that:

The writings and teachings of the Honorable Elijah Muhammad have been described as capable to two interpretations by rational persons; first, "as an endorsement of a concept of intense hatred for all whites, who are referred to as 'devils'." Further, these writings and teachings could be interpreted as an endorsement of a concept that whites generally and prison and government authorities, should be defied by Muslim prisoners even when legal orders or demands are made.

There are, moreover, religions that teach the propriety of human sacrifice, torture, and enslavement, and there are religions which have as a part of their dogma the use of drugs. Without expanding upon the variety of religious beliefs or practices of this sort, we need only be reminded of the fact to realize that any such flat prohibition of inquiry on this subject would be most unwise and dangerous.

(3) As to the prohibition upon inquiry into sexual matters and conduct, with a limited exception for such inquiry only in cases where the executive agency possesses information of a "specific" charge of sexual misconduct, it is apparent here that the prohibition is much too restrictive. It would prohibit inquiry of a limited and generalized nature, such as a single question, "Are you a homosexual?" Such inquiry would be prohibited even in cases where the appearance of the individual might suggest the propriety of the inquiry. Further, the limitation as to "a specific charge" of sexual misconduct would even preclude inquiry in cases where there were frequent and persistent rumors within the community of the individual's sexual misconduct, or of his character as a homosexual, unless evidence was at hand of facts which would support a "specific" charge or instance of actual misconduct in which he had engaged. Proof of a specific charge of sexual misconduct is difficult if not impossible to obtain, except possibly through the applicant's own admissions.

PARAGRAPH (6), SUBSECTION (a) OF SECTION 7173

Fourth, paragraph (6), at page 7, line 5, of the bill would prohibit any inquiry into the property or source of income or expenditures of an employee of an executive agency, with the exception of inquiries by the Treasury Department for ascertaining tax or similar liabilities, or by a Federal agency in relation to financial or commercial transactions with the United States. This provision would thus prohibit inquiry as to all other factors of significance in ascertaining the individual's suitability for retention in employment, particularly on loyalty and national security grounds. A Federal employee may be employed by foreign agents and may receive property or income from them for purposes of espionage or sabotage, or from subversive organizations or individuals for the conduct of such as well as other subversive activities, within and without the Government, yet, this flat prohibition of paragraph (6) would prohibit all inquiry on the subject. An individual may also be making personal expenditures by ways of dues and other contributions to subversive organizations and individuals, and yet the provisions of this paragraph would make it unlawful for an official of an executive agency to make any inquiry of him on the subject. The absurdity of this prohibition must be evident on even cursory analysis.

PARAGRAPH (8), SUBSECTION (a) OF SECTION 7173

Fifth, in light of the foregoing, your paragraph (8), page 8, at line 17, of the bill would serve only to tie the hands of the executive in support of the limitations imposed by the preceding paragraphs and, of course, are highly objectionable on that ground and for that reason.

SUBSECTION (b) OF SECTION 7173

Sixth, the provisions of subsection (b) of the bill, at page 9, line 7, in exempting certain specific agencies from the operation of the foregoing paragraphs of subsection (a) does not serve to relieve the situation in any appreciable degree. The limitations imposed in the provisions of subsection (a) apply to all other agencies of the Government which, in varying degrees and ways, exercise national security functions and are not excepted from the operation of the restraints, including such sensitive agencies as the Departments of Justice, State, and Treasury, the Atomic Energy Commission, NASA, and the U. S. Arms Control and Disarmament Agency, to name but a few. Even with respect to the limited specification of exceptions for the Central Intelligence Agency, National Security Agency, and the Federal Bureau of Investigation, you make no exception for equally sensitive investigative agencies such as the Secret Service, those within the Internal Revenue Service, the Bureau of Customs, and the Immigration and Naturalization Service.

SECTION 7174

Seventh, in the establishment of a Board on Employee Rights in the provisions of 7174, at page 10, line 22, of the bill, you superimpose upon the numerous agencies and remedies now afforded in the administration of the Civil Service laws and regulations, a wholly unnecessary apparatus which is not likely to have very much to do, if anything, but will do it in a wasteful and expensive manner. Any prohibition upon the conduct of executive personnel, whether imposed by legislation or by executive order and regulations in limiting inquiries on the few and minor subjects specified in section 7173 of the bill, will obviously be respected by them almost without exception. This new Board that would be created would be even less busy than the lately bemoaned Subversive Activities Control Board, which was the subject of much controversy for similar reasons. It seems to me that the bill would fashion a howitzer to swat a gnat.

SECTION 7175

Eighth, in enlarging the jurisdiction of the Federal courts in the provisions of section 7175, at page 18, line 6, of the bill to afford review of the orders of the Board on Employee Rights, it seems that you are, in the words of Virgil, piling Pelion on Ossa. It is not only unnecessary, but this is one more step toward judicial autarchy. It is not enough that the Judiciary is moving rapidly enough without any assistance from the Legislative Branch toward drawing to itself total power in dictating every aspect of the social, economic, and political life of this Nation. (For the latest incursion by the Judicial Branch upon the Legislative, see for example, Doe v. McMillan, decided May 29, 1973.) This bill would further contribute to the process of making this Nation the most litigious people in the history of civilization. The result of the total effort can serve only to intimidate, distract, harass, and obstruct the vast body of dedicated, able, and law-abiding Federal administrators.

Exhibit A

UNITED STATES CIVIL SERVICE COMMISSION
Office of the General Counsel
Washington, D.C. 20415

June 27, 1973

Honorable Richard H. Ichord
Chairman
Committee on Internal Security
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in further reply to your letter of June 11, 1973, in which you presented a number of questions respecting provisions of H. R. 1281, a bill relating to invasions of the privacy of Government employees. You stated that you understood that I had testified before the Waldie Subcommittee on Retirement and Employee Benefits of the House Committee on Post Office and Civil Service regarding H. R. 1281. Actually, I accompanied Mr. Robert J. Drummond, Jr., Director of the Commission's Bureau of Personnel Investigations during his testimony before the Subcommittee on May 15, 1973. We had been informed by the Chairman of the Subcommittee that the Subcommittee was particularly interested in the Commission's relationship with the House Internal Security Committee, including detailed descriptions of what use is made of that Committee's services, documents, and files by agencies of the Federal Government. We prepared our testimony to respond to this inquiry. A copy of Mr. Drummond's prepared statement is attached.

With respect to H. R. 1281, we are presently preparing comments for submission by the Commission to the House Post Office and Civil Service Committee. However, since H.R. 1281 is identical to H.R. 11150 of the 92d Congress, on which the Commission reported, I believe I can answer your questions on that basis.

Your first questions were with respect to the proposed paragraph (1) to section 7173(a) of title 5, United States Code, contained in section 1 of H. R. 1281. This paragraph would prohibit an Executive agency from requesting or requiring an employee or applicant to disclose race, religion, or national origin (with specified exceptions). You first asked what our present practice is with respect to inquiries of this character. The Civil Service Commission used a self-disclosure method once, in 1966, and has not used it since.

You then asked if we have regulations on the subject. Our regulations are found in Subpart C of Part 713 of Title 5 of the Code of Federal Regulations and Subchapter 3 of Chapter 713 of the Federal Personnel Manual. A copy of these regulations is attached.

Your next question was whether, with respect to inquiries on race, religion, or national origin, we have had any complaint, and if so, how many in number over the past three years. (You later asked the same question with respect to privacy invasions under three other proposed subparagraphs.) The Commission has no current statistics on complaints of invasion of privacy but we do not believe that there are many such complaints. In 1971 the Commission conducted a survey to determine whether employees were using the customary grievance procedures to complain of any of the 11 types of grievances contained in Senator Ervin's prototype bill. We discovered that of 5,688 grievances filed in 25 agencies, only 7 grievances were of the type described in these bills, and 2 of the 7 would not be covered by H.R. 11150, 92d Congress (or H.R. 1281, 93d Congress) because of the exclusions in the bill.

You asked similar questions with respect to three other paragraphs in the bill (3, 4, and 6) which I will attempt to answer in turn.

The proposed paragraph (3) would prohibit an Executive agency from coercing, requiring, or requesting an employee to participate in nonwork-related activities or make any report on any nonwork-related activity. Exceptions are made for conflict-of-interest cases, where the activity conflicts with, or adversely affects, performance of official duties, and for public service programs.

The Commission's present (and longstanding) practice is not to coerce or require any participation in nonwork-related activities. The Commission requests participation in public service programs such as the Red Cross blood donor program and civil defense activities but these would be covered by the exception in the bill. A copy of Subchapter S11 of Supplement 990-2 to the Federal Personnel Manual, relating to excused leave for public service programs is attached.

The proposed paragraph (4) would prohibit an Executive agency from requiring or requesting an employee or applicant for employment to submit to interrogation or examination or take a polygraph or psychological test concerning personal family relationships, religious beliefs or practices, and sexual matters. Exceptions are made for physicians in mental illness cases, for officials advising employees or applicants of sexual misconduct charges, and for officials seeking family information in national security cases.

The Commission's practice is not to use polygraph tests, which are only used by the security agencies. We do not inquire about religious beliefs or practices of employees or into their sexual matters or family relationships except where any of these matters relates directly to job qualifications or fitness, as in the cases mentioned in the exceptions and in nepotism under section 3110 of title 5, United States Code.

The proposed paragraph (6) prohibits an Executive agency from requiring or requesting an employee, other than a Presidential appointee, to disclose his property or that of his family. Exceptions are made in cases of tax determinations, tariffs, customs duties or similar obligations to the United States and conflict-of-interest cases.

The Commission's practice is to limit its inquiries as to the property of employees and their families to possible conflict-of-interest cases. The Commission's regulation of agency requirements for financial statements from employees is contained in Subpart D of Part 735 of Title 5 of the Code of Federal Regulations (attached).

Your next question related to the creation of the Board on Employee Rights by the bill. You asked if the Commission did not already have comparable procedures for receiving and hearing complaints related to the subjects covered by the bill. The Commission has always opposed the creation of this independent Board of Employee Rights as the most objectionable feature of the bills that have been introduced relating to privacy of Federal employees. The Commission has maintained that all or part of each of the subjects covered by bills such as H.R. 1281 is suitable subject matter for negotiation at the bargaining table between management and employee labor organizations. In addition, the Commission cannot understand why the full measure of the complexities of the administrative procedure statute is applied through a new agency to this narrow range of grievances which have little effect on an employee's career, while the much more serious consequences of adverse actions which result in dismissal are entrusted to the more simple procedures followed by the agencies and the Commission.

Your final question was what the Commission's position is as to the necessity or desirability of this measure. As I stated earlier, the Commission has not yet reported on H.R. 1281. However, I believe that it is safe to say, based on the Commission's position on similar bills in the past Congress, that the Commission would be opposed to enactment of any legislation similar to H.R. 1281 on the grounds that its provisions are unnecessary and would impose a substantial administrative burden on Executive agencies and the Civil Service Commission without any corresponding benefit to Federal employees. So that you may be more fully informed on our detailed reaction to each of the bill's provisions, I am enclosing a copy of the report we sent to Chairman Hanley on October 20, 1971 on H.R. 11150 (identical to H.R. 1281).

Sincerely yours,

s/ Anthony L. Mondello

Anthony L. Mondello
General Counsel

Attachments

Exhibit B

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

August 21, 1973

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on certain questions raised during the course of the hearings on H.R. 1281 and similar bills dealing with the privacy of Federal employees.

Except for several provisions, H.R. 1281 is substantially identical to H.R. 228, 92nd Congress, 1st Session, to which this Department expressed its views in a report to the Chairman, Committee on Post Office and Civil Service, dated March 26, 1971. H.R. 228 was substantially identical to H.R. 1197, 91st Congress, 1st Session, to which the Department expressed its views in a report dated July 10, 1970. We also submitted a report on June 27, 1968, on S.1035, 90th Congress, a similar bill.

In reply to the questions contained in your letter, complaints in matters covered in questions 1 through 4 have never been a problem within this Department and we are unable to recall having received any such complaints from employees or applicants within the past three years. In addition there are no Department regulations governing these matters except for 28 C.F.R. Sections 45.735-22, 45.735-23 and 45.735-24 (copy attached) which require employee disclosures as they might relate to conflict of interest questions. As concerns question 1, which covers disclosure of race, religion or national origin, it should be noted that information of this type required for minority group statistics is obtained through supervisory identification procedures. It should also be noted that those sections of H.R. 1281 relating to questions 3 and 4 are objectionable as written because inquiries regarding sexual matters are, on rare occasion, required to resolve suitability and security considerations. Also there is a need to make financial inquiries when an employee is alleged to be guilty of misconduct. It is essential to protect both the innocent employee and the public interest by expressly permitting inquiries regarding financial interests when undertaken by a law enforcement or internal security authority which has reason to believe that an individual has profited from privileged information, accepted a bribe or otherwise acted improperly.

With respect to question 5 concerning the creation of a Board of Employee Rights, as provided in Section 7174, page 10, line 22, of the bill, we question whether such an independent Board, separate from the Civil Service Commission and designed to address itself solely to alleged

employee grievances, is necessary. Such a Board would clearly appear to encroach upon the Executive's constitutional and statutory powers over the administration of Executive departments, agencies, and their employees (5 U.S.C. Section 7301), fragmenting the personnel authority of the Civil Service Commission and reducing the effectiveness of the personnel authority of the heads of agencies. As suggested by former Civil Service Commission Chairman John Macy in his testimony before Congress, an alternative to an independent Board would be to accord employees the right of appeal to the Civil Service Commission of any grievance arising out of allegations of violations of the rights which would be granted employees by the bill.

It is unclear whether Section 7174's procedure is to replace the appeals process now provided under the Civil Service Commission's regulations, or whether the bill envisions two separate appellant procedures.

An independent Board would interfere needlessly with countless executive, managerial and administrative decisions made on a day-to-day basis by the departments and agencies of the Executive Branch.

Moreover, Section 7175 would not merely authorize a federal district court to review the Board's determination or order adverse to an aggrieved employee or applicant, but would eliminate the "substantial evidence" standard of review in cases where the employee filed a complaint for a trial de novo on the violation or threatened violation of Section 7173(a). Again, this provision contemplates judicial intervention in the day-to-day operations of the Executive Branch.

Although this Department supports the salutary objective of H.R. 1281 and of its predecessors to protect Government employees from unwarranted encroachments on their personal privacy and on their exercise of constitutional rights, the Department recommends, as it has done with respect to prior bills, against enactment of this bill in its present form.

Cordially,

s/Mike McKevitt

MIKE McKEVITT

Honorable Richard H. Ichord
Chairman, Committee on Internal Security
House of Representatives
Washington, D. C. 20515

WASHINGTON OFFICE

AMERICAN CIVIL LIBERTIES UNION

410 FIRST STREET, S.E., WASHINGTON, D. C. 20003 (202) 544-1681



CHARLES MORGAN, JR.
Director

HOPE EASTMAN
Associate Director

ARLIE SCHARDT
Associate Director

MARY ELLEN GALE
Counsel

March 1, 1974

Dear Member of Congress:

In his State of the Union message, President Nixon listed as one of his ten priorities protection of "the right of personal privacy of every American."

We agree with the emphasis the President intends to place on this vital issue. In his words, "one measure of a truly free society is the vigor with which it protects the liberties of its individual citizens."

However, neither his five-page speech on the right of privacy given last Saturday nor the 11-page accompanying fact sheet outlining the specific tasks to be given his Domestic Council Committee on the Right of Privacy contain the slightest reference to the whole question of political surveillance. Perhaps the most fundamental guarantee in the Bill of Rights, and one which is at the heart of the right of privacy, is the promise that each individual will be free from governmental surveillance of his or her political beliefs and activities. This very freedom has been most sorely abused in both the Watergate scandal and the earlier controversy over Army spying on civilians. Yet the President has totally omitted this vital question from his definition of privacy.

Moreover, we are deeply concerned that the creation of a Domestic Council Committee on the Right of Privacy could delay Administration support for specific legislative and administrative proposals. Therefore, as the enclosed memorandum outlines, we have identified for immediate action a list of over 40 legislative and administrative solutions to problems which have already been identified and studied.

A vast number of bills have already been introduced by conservatives and liberals alike. As the President noted, the subject has been studied again and again by Congressional Committees and Subcommittees. Prestigious governmental and private studies have been conducted. The National Academy of Sciences has sponsored a study which resulted in the comprehensive book, "Data Banks in a Free Society." The Stanford Research Institute has already done a study of computer abuse and is continuing a survey of such abuses in a wide range of governmental and private institutions. The 185th General Assembly of the Presbyterian Church adopted a Statement on the Preservation of Privacy, containing a detailed set of recommendations to ensure privacy. The Lawyers Committee for Civil Rights Under Law has released a series of reports on its studies which, in part, dealt with invasions of privacy by the criminal justice information systems of LEAA. And in April, the Senate's Subcommittee on Constitutional Rights will issue a report on a four year study of all federal government data banks maintained on American citizens.

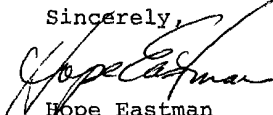
As the President noted in his message, his own Department of Health, Education, and Welfare released a report of its Advisory Committee on Automated Personal Data Systems in July, 1973. Beginning in the spring of 1971, this distinguished panel drafted a comprehensive set of practical recommendations, much of which could be implemented by immediate Executive branch action. Indeed, many of the items to be placed on the agenda of the President's Domestic Council Committee have already been the subject of recommendations by the HEW panel.

The past year has been traumatic for the country. Amidst the constant revelations of illegal activities and abuses of power by persons in positions of high authority, the greatest casualty has been the Bill of Rights. We believe that the nation could benefit greatly from a concrete realization at the highest levels of government that the right of privacy is indeed something precious. However, only strong and prompt action to safeguard the right of privacy, not just more words and another study, will convince the nation's citizens that its leaders do not continue to place themselves above the rule of law and beyond the Constitution. The safeguards of individual privacy outlined in the enclosed memorandum provide a blueprint for meaningful action now.

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We urge you to examine each of the proposals in the enclosed memorandum and to do what you can to see that Congressional or Executive branch action is taken on them now. We would be happy to work with you or members of your staff on all or any of the above proposals.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Hope Eastman', written over the word 'Sincerely,'.

Hope Eastman
Associate Director

HE/sas
enc.

WASHINGTON OFFICE

AMERICAN CIVIL LIBERTIES UNION

410 FIRST STREET, S.E., WASHINGTON, D. C. 20003 (202) 544-1681

MEMORANDUM:

A PROGRAM TO SAFEGUARD INDIVIDUAL PRIVACYCHARLES MORGAN, JR.
DirectorHOPE EASTMAN
Associate DirectorARLIE SCHARDT
Associate DirectorMARY ELLEN GALE
Counsel

In his recent State of the Union message, President Nixon listed "the right of privacy" as one of his ten priorities. In his follow-up message last Saturday, he promised us a complex and necessarily lengthy study of the privacy issue by a Domestic Council Committee on the Right of Privacy. This memorandum is intended as a blueprint for both Congressional and Executive branch action to safeguard the right of privacy.

Needed privacy legislation can be broken down into six major categories. The list set forth here runs to some forty different legislative proposals. There may be others. The six main categories are:

- A. Legislation to protect citizens against invasions of their political rights.
- B. Legislation to protect citizens against abuse of the criminal process.
- C. Legislation to control wiretapping and bugging.
- D. Legislation to control government data collection and computerized data banks.
- E. Legislation to control private data collection and computerized data banks.
- F. Legislation to increase citizens' ability to enforce these rights against government and private organizations.

A. Legislation to Protect the Right to Political Privacy

From the disclosure that the Army had been spying on American civilians who simply disagreed with their government to the dramatic Watergate revelations, the discoveries of the past few years show that perhaps our most pressing privacy problem is political surveillance and intelligence gathering,

especially the kind which suppresses dissent and infringes on the First Amendment rights of every American to think and speak as he or she pleases without having to fear that there is a government spy behind every mailbox.

First, there should be a strict prohibition on all government intelligence and surveillance aimed at the beliefs, views, opinions, or political associations and activities of Americans. Under the First Amendment, citizens have a right to speak and a right to keep silent about their political beliefs. It is no crime to disagree with the government. There is no justification for governmental collection of intelligence on its political opponents to stifle their opposition. Government surveillance of public political activity discourages Americans from speaking out on public issues, conduct at the very heart of our democracy which instead should be encouraged.

Second, we should enact without delay legislation that specifically prohibits the military from spying on civilian citizens. Senator Sam Ervin and thirty-four co-sponsors introduced such a bill, S. 2318, which will be the subject of hearings early in April. Similar bills have been introduced in the House. If it is serious about privacy, the Administration should begin supporting such legislation.

Third, all existing government dossiers on peaceful political activity should be destroyed.

Fourth, rules should be written to control the use, dissemination and verification of any legitimate intelligence files which are retained after deletion of references to conduct or beliefs protected by the First Amendment. Serious consideration should be given to a rule requiring that each subject of an intelligence file be given notice that a dossier exists on him or her. Such a rule exists for wiretapping done under Title III of the Safe Streets Act of 1968.

Fifth, there should be a prohibition on the computerization of any and all intelligence information. This kind of file is dangerous in the extreme even under the best of circumstances. Putting intelligence information in computers greatly increases both the potential volume of this information and its instant retrieval and would multiply the harm it can cause.

Sixth, it is clear to all except those holding the most extreme views of Presidential power that warrantless wiretapping, bugging, burglary, opening of mail and other illegal activity cannot be justified under any theory of expediency. This activity is already criminal. The Congress should disavow it expressly, and declare that not even the invocation of "national security" can justify violations of the law or infringements of the Bill of Rights. Along with this Congressional disavowal, mechanisms to strike down the automatic invocation of "national security" as a cloak to hide violations of the Bill of Rights should be devised.

Seventh, legislation should be enacted applying Fourth Amendment requirements to the use of informers and infiltrators. Too often, we have seen government agents identified as the source of the inspiration, planning, funds and weapons for illegal activities that might never have occurred without government support. Many prosecutions have failed because of the government informer's illegal or improper behavior. The use of agents provocateur should be prohibited, and no informer should be recruited or infiltrator placed within an organization unless probable cause is found that a criminal violation of law is imminent, and a judge issues a warrant authorizing the informer's activities. These activities are no less susceptible to abuse than wiretapping and should be subject to legal restraints.

Eighth, there should be a general reform of the grand jury system to prevent its political use as a device to harass political enemies and secure domestic intelligence. Of the many suggestions that have been made, the most basic would be a prohibition on inquiries which invade First Amendment rights.

B. Legislation to Protect Against the Abuse of Criminal Information and Law Enforcement Techniques

The second major area has to do with the collection of criminal justice information and with control of some investigative techniques.

First, a prohibition on the computerization of intelligence information, application of Fourth Amendment principles to the use of informers and infiltrators, and reform of grand juries have already been mentioned. These reforms are needed when the object of government activity is the enforcement of the ordinary criminal law, as well as when the government's efforts touch on political beliefs and activities.

Second, the need for legislation to control the dissemination of criminal justice information has been widely recognized. The Justice Department's National Advisory Commission on Criminal Justice Standards and Goals found that privacy can be seriously damaged when such information is inaccurate, incomplete, unjustified, or improperly disseminated.

In recent years, the Congress has repeatedly attempted to deal with this problem. After years of opposition, the Administration has now sent to the Congress a bill (S. 2964) which recognizes the problems and makes a welcome and serious attempt to solve them. Along with S. 2963, sponsored by Senators Ervin and Hruska, and H.R. 188 and H.R. 9783, sponsored by Congressman Don Edwards, the Administration bill will be the subject of hearings this month and next before the Senate Judiciary Subcommittee on Constitutional Rights and the House Judiciary Subcommittee on Civil Rights and Constitutional Rights.

Any legislation enacted by the Congress should contain the following substantive requirements:

a. Conviction records should be retained only until the individual has served his or her sentence. At that time they should be destroyed, their use for any purpose forbidden. Only in this way can meaningful rehabilitation take place. The record of an arrest, along with dispositions other than conviction, should be destroyed once there is a disposition.

b. Neither conviction nor arrest records should be available to non-law enforcement agencies, government or private, for uses such as employment and the like.

c. Criminal intelligence data should not be computerized.

d. Along with these special restrictions, comprehensive rules should be promulgated, pursuant to authorizing legislation, to provide for individual access, right of correction, and legal recovery for any harm caused by the misuse or improper retention of information.

e. These safeguards should be applicable to federal and state agencies which should share control and administration such systems. We strongly oppose the creation of a national data bank of criminal justice information.

The Ervin bill, S. 2963, comes closer to these objectives than any of the others.

Third, we should repeal the no-knock search authority which was granted in 1969 for the District of Columbia and in 1970 for drug-related searches. No-knock has proved its opponents all too correct. There have been deaths, gross invasions of homes, and much human suffering for little good. The same Administration which sought the authority and failed to prevent its abuse would do well to urge its repeal.

Fourth, legislation to protect a reporter's right to confidentiality of news sources should be enacted. The Justice Department, under Attorney General Richardson, recently took a step forward by issuing new regulations to safeguard the First Amendment against intrusions by the prosecution. Both the House Judiciary Committee under Congressman Kastenmeier and the Constitutional Rights Subcommittee under Senator Ervin have held hearings and are considering legislation to protect these sources. Thus far, the White House has opposed all such legislation. Permanent legislation is necessary to expand the protections and insure that future Attorneys General are not free to rescind even the present regulations.

C. Legislation to Control Wiretapping and Bugging

The third major area where the government can act to protect privacy has to do with wiretapping and bugging. The ACLU is totally opposed to any use of wiretapping. It is just the kind of unlimited general search prohibited by the founders of our country in the Fourth Amendment. If, however, the government is to continue any use of wiretapping, certain reforms are drastically needed. These reforms are needed urgently and should not be delayed while we wait both for the Report of the President's Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (scheduled for June, 1975) and the President's Committee on the Right of Privacy which is not even to begin its work in this area until the Commission report is made.

First, wiretapping of any American should be prohibited unless pursuant to a court order under Title III, so that probable cause has been shown to a court. This has long been recognized as the law, but the Administration claimed the right to wiretap American citizens without court order in the name of domestic security until the Supreme Court unanimously rejected that theory in United States v. United States District Court, 407 U.S. 297 (1972). The President could act immediately to insure that this decision is fully implemented by all federal agencies with wiretap authority.

Second, the Congress should enact legislation which prohibits the use of wiretapping and bugging of Americans for any "foreign intelligence" purpose. The bugging and tapping of government officials within the Executive Branch is not only illegal and a violation of constitutional rights, but a grave affront to those citizens in whom the President has lodged a special trust and confidence. Drawing upon the amended version of S. 2820 introduced by Senator Gaylord Nelson on February 4, 1974, such legislation should enforce these limits by requiring that electronic surveillance for "foreign intelligence purposes" be aimed at foreign agents and installations and be conducted only where a court has granted a warrant.

Third, the Congress should consider a ban on both secret tapping and bugging by one party to a conversation and "wired" informers except by court order. Present law exempts this kind of electronic eavesdropping on the theory that at least one party has consented to the overhearing. But the abuses that flow from such practices, as illustrated by the controversy over the Presidential Watergate tapes, compel another look. At the minimum, there should be a requirement, as suggested by Senator Bayh in S. 2542, that both parties are on notice when a conversation is being recorded.

Fourth, some of the present statutory rules for court-ordered wiretapping need significant tightening. According to several

studies done by Professor Herman Schwartz of the State University of New York at Buffalo, the vast majority of Title III wiretaps involve gambling; the low number of convictions does not warrant the cost; wiretapping is permitted to investigate too many crimes where the likelihood of finding evidence through wiretapping is extremely limited or nonexistent; it is too easy to get extensions; and the individual's remedies for illegal surveillance are wholly inadequate.

D. Legislation to Control Government Data Banks and Computers

The fourth area has to do with legislation in the nonpolitical, non-criminal fields of government data collection. The recent report of the Department of Health, Education and Welfare's Advisory Committee on Data Banks and Privacy, "Records, Computers and the Rights of Citizens," is the source of a comprehensive set of recommendations with government-wide applicability. Indeed, the President's Domestic Council study seems destined to duplicate this excellent work.

Among its most important proposals is one for a Code of Fair Information Practices to govern all automated data systems maintained by the government. This Code would establish specified safeguards to insure privacy, confidentiality and accuracy of records, make it an "unfair information practice" to violate them, and give individuals a wide range of remedies to enforce their rights. Other specific recommendations for legislation include:

1. returning control over personal information in administrative, investigative, and statistical data banks to the individual to whom it relates.
2. prohibiting disclosure, whether by compulsory process or otherwise, of data which can be traced to identified individuals when the information was originally collected for statistical purposes or for research.
3. requiring the government to disclose to an individual all the uses to be made of information any time it sends him or her a questionnaire.
4. telling the citizen honestly whether he or she is required to give the government information, or whether cooperation is voluntary.
5. obtaining the individual's consent before information collected for one purpose is used for another purpose.
6. prohibiting the use of Social Security numbers except where specifically required by law, and giving an individual the right to refuse to disclose that number to government or private entities except as required by statute.
7. prohibiting the creation of a Universal Numerical Identifier.
8. giving every individual the right to inspect any file held by the government on that individual and to make corrections where necessary.

9. requiring that all computer systems have an approved system to insure privacy and security before they are created; subjecting each of them to public scrutiny in advance; requiring full disclosure of the contents, uses, purposes, rights, and other aspects of each system; creating a public registry of all such systems; and making certain they are subject to periodic oversight after they go into operation.

Congressman Barry Goldwater, Jr., has already introduced model legislation, H.R. 10042, to control government data banks based on the HEW Privacy Report. Senator Goldwater has introduced S. 2810, a similar bill. Congressman Koch introduced the first such bill back in 1969. Designed to guarantee individuals knowledge of and access to their own records, it is now the subject of active Congressional consideration. Other legislators have introduced bills designed to accomplish one or more of the specific recommendations of the HEW Report.

Outside of computerized systems, there is also much that can be done.

First, access to individual bank records, including checks, can provide mass amounts of information on the private or constitutionally protected aspects of an individual's life. Legislation to require either formal legal process or customer permission when the government seeks to examine bank records would control this invasion. Senator Cranston's bill, S. 2200, and Congressman Stark's bill, H.R. 9424, are two proposals leading to this end. Thus far the Administration has opposed them, despite the fact that the bills do little more than give the bank customer notice when the government wants to seize his or her records, and, under some circumstances, an opportunity to present any defenses in a court hearing. The bills seek merely to apply the same Fourth Amendment rules and that minimum standard of fair play to the government's access to citizens' bank records and cancelled checks that would exist if the citizen retained control over these records.

Second, the Congress should enact legislation regulating governmental scrutiny of the telephone call records of the millions of telephone customers. In recent weeks, we have learned that the nation's largest telephone systems have given the government lists of telephone calls made by various newsmen and news-gathering organizations, with serious impact on the freedom of the press. All American citizens are entitled to procedures which will safeguard the confidentiality of this information from government access except where a court has found probable cause to believe a crime has been committed and has limited the access to only that information specifically relevant to that crime.

Third, perhaps the biggest unkept secret in government is the individual tax return. Despite the statutes and regulations which seek to preserve its secrecy, many Executive branch agencies and Congressional Committees regularly get broad access to tax returns. In 1973, the year started with the President giving the Agriculture Department access to the returns of all of the nation's farmers. It ended with evidence that the Justice Department's Internal Security Division, with questionable authority, had some kind of "informal" arrangement to check the returns of dissenters on its domestic surveillance computer. In between, we have had allegation after allegation of the use of the tax process by White House officials to punish the President's enemies and protect his friends. The House Government Operations Subcommittee on Foreign Operations and Government Information has recently recommended that government use of tax returns be limited to administration and enforcement of the tax laws, with any other use requiring the prior consent of the taxpayers. (H. Rpt. 93-598).

Fourth, as each decennial census has come upon us, public attitudes have been increasingly critical of what are regarded as unnecessary invasions of privacy by the Census Bureau. This has become so serious that the reliability of the census, which in the last analysis depends on public good will and cooperation, has been seriously impaired. The main public concern has been directed not at the basic vital statistics and head count questions, but at the other inquiries which, with each decade, probe deeper and deeper into the personal relationships and living habits of Americans.

Legislation has been introduced in the Senate to remove the criminal penalties from the non-head-count questions which generally are used for the benefit of private industry. The House Post Office Committee has reported out a bill for comprehensive reform in this area. (H.R. 7762).

Fifth, Congress should require public schools receiving federal funds to guarantee the confidentiality of records on students against access by all those outside the school except for parents of the children and, absent contrary directions from individual parents, to destroy all records other than grades when the child leaves the school.

E. Legislation to Control Private Data Collection and Computerized Data Banks

Dangers to the right of privacy are not limited to the public sector. As computers have flourished, so have the risks to the individual as he or she attempts to deal with the variety of private institutions which increasingly collect information on individuals. Congressional action in a number of areas is urgently needed.

First, the recommendations of the HEW Advisory Committee on governmental automated data systems should be applied as standards for the rapidly growing numbers of private data banks. The Congress should enact the "Code of Fair Information Practices," as outlined in Congressman Goldwater's bill, H.R. 10042, for all data systems operated by private organizations which receive federal funds or operate in interstate commerce.

Second, the Fair Credit Reporting Act, which went into effect in 1971, was intended to correct the shocking abuses which had previously come to light in the area of consumer credit. Although the President made no mention of this fact in his privacy message, it has become widely recognized that further reforms are needed. Led by Senator William Proxmire, efforts to enact such reforms (S. 2360) are now centered in the Senate Committee on Banking, Housing and Urban Affairs.

Needed reforms include: 1) requiring agencies seeking a report on an individual to obtain his or her consent, after explaining the scope and methods of the investigation; 2) giving the subject the right to inspect and obtain a copy of his or her file and to obtain expungement or correction of incorrect or incomplete information; 3) limiting dissemination to those authorized by the subject in writing to receive them; 4) banning the collection of certain kinds of information, such as political views, race, religion, arrest records and uncorroborated hearsay; and 5) strengthening the remedial and enforcement provisions of the FCRA, as suggested in S. 2360.

Third, the Congress should study a proposal by the Federal Reserve Board which is intended to take us closer to the "checkless-cashless" society through the use of an "Electronic Funds Transfer System." At the present time, the sheer volume of checks gives individuals a certain measure of privacy. But if data on individuals and businesses are centralized, information on an individual's business and personal life will become readily accessible.

Fourth, Congress should take a critical look at the use of lie detectors in employment. These devices are not legally competent. They are rejected by the FBI and many other professional investigators. They are an affront to the personal integrity of the individual. Their accuracy is subject to question, and they are an unfair means of psychological coercion. The Congress should consider banning lie detectors and similar devices as a condition of employment in businesses receiving federal funds or operating in interstate commerce, as well as in the federal government itself.

Fifth is a proposal regularly made by many legislators that the government get out of the business of selling mailing lists to private commercial businesses. These lists are compiled for official purposes at taxpayer expense. The Congress should either ban the dissemination of such lists or give individuals the right and a practical means of preventing the government from including them on such lists.

Sixth, the traditional confidentiality of the doctor-patient relationship is being seriously eroded by increased governmental demands for medical information in order to evaluate health care and medical costs, by increased demands from private insurance carriers to evaluate doctors' bills and by the increased computerization in both the private and public sector making collection, storage and retrieval of massive amounts of medical information easier than in the past. As the Congress begins to consider comprehensive national health insurance, it should build in safeguards to cure these problems.

F. Legislation to Increase Citizens' Ability to Enforce these Rights Against Government and Private Organizations

Many of the proposals contained in the preceeding pages contain within them a variety of enforcement mechanisms. Rights are often meaningless without strong and practical methods to enforce them. Special attention, therefore, needs to be paid to a number of proposals which are designed to serve as enforcement mechanisms for a wide variety of aspects of the right of privacy. It is vitally important that the Congress study these proposals and enact some combination of them, for at the present time the ability of the individual to enforce his or her right of privacy is sorely limited.

First, drawing on experience with the National Environmental Policy Act's requirement of an "environmental impact statement," Congress should consider enactment of a statute which would require a "privacy impact" statement prior to the establishment of any new federal or federally-funded program. Such a statute, spelling out the factors to be considered, would insure that privacy considerations were actually taken into account before any decision to proceed was made.

Second, the Congress should enact a set of comprehensive private remedies which would be available to enforce whatever substantive rights of privacy the Congress grants or the Constitution guarantees. Such remedies should include easily enforced civil penalties (liquidated, actual and punitive damages, along with attorney's fees), injunctive remedies, and criminal penalties. These remedies should apply both against governmental and private entities and individuals. Sections 308 and 309 of S. 2963 on criminal justice data banks provide a good model for more general legislation.

Third, at present, the doctrine of sovereign immunity frustrates claims for compensation from the citizens wrongfully harmed by the federal government. This is one proposal on which the Administration has recently taken an active and constructive stand. First, they drafted a bill, S. 2558, introduced by Senator Hruska, which would remove sovereign immunity as a defense to intentional torts by federal agents. The Administration has also supported an

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amendment to H.R. 8245, sponsored by Senators Percy and Ervin, which has now been reported unanimously by the Government Operations Committee and passed by the Senate. Administration support in the House will help immensely with achievement of this simple but essential step.

* * * *

Taken together, these many proposals would put some aspects of individual life beyond the reach of governmental curiosity and would insure that the citizens have both the right and the mechanisms to stop invasions of their privacy which are either undesired or unlawful. There is no more important work than to do battle on behalf of the rights and liberties of American citizens. As the President himself has noted, "a system that fails to respect citizens' right to privacy, fails to respect the citizens themselves."

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THE ASSOCIATION OF THE BAR
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Legislation to Protect Federal Employees' Privacy

By THE COMMITTEE ON FEDERAL LEGISLATION

Legislation aimed at protecting federal employees' rights to privacy was passed in both Houses in the 92nd Congress, but no conference report was filed and the legislation was not finally enacted into law.* Similar legislation has been introduced in the House in 1973, e.g., H.R. 856, and it is anticipated that a revised version of the proposal will also be re-introduced in the Senate.

The legislation results from extensive hearings and legislative activity over several years, described generally in S. Rep. No. 92-1006, 92nd Cong., 2d Sess. (8/1/72), pp. 4-60 (hereafter, the "Senate Report"). The basic facts upon which the legislation is based, however, were developed at hearings in 1966 and 1967 and involved abuses occurring before that time. No substantial evidence of recent or current abuses in the area is on record. We do not believe that action of this scope would be justified unless significant contemporaneous abuses can be shown.

We also believe that significant changes are needed if this legislation is to be workable and in order to avoid "overkill" that could seriously interfere with the functioning of federal agencies.

Our concerns are with both the breadth of some of the prohibitions contained in the bills and with the remedial structure adopted for enforcement of their provisions.

I. Description of the Legislation

The basic provisions of the proposed legislation, as exemplified by H.R. 856, would make it unlawful for any

* S. 1438, 92nd Cong., 1st Sess. (1971); H.R. 12652, 92nd Cong., 2d Sess. (1972).

officer of an Executive department or agency, or anyone acting under authority of such an officer, "to require or request, or to attempt to require or request" any employee or applicant for employment to perform various listed acts. Also made unlawful is the taking of other specified steps to encourage such acts. Narrow exceptions are provided. The areas protected deal with:

(a) Disclosure of the race, religion or national origins of an employee or his forbears;

(b) Attendance or non-attendance of employees at meetings other than those concerning official duties, or the development of skills which qualify an employee for the performance of such duties, and other forms of participation in outside activities unrelated to official duties;

(c) Any interrogation, examination, polygraph test or psychological test designed to elicit information concerning personal relationships with family members, religious beliefs or practices, or sexual conduct or attitudes;

(d) Political work or contributions;

(e) Contributions to bond drives and charitable appeals, to the extent coercion is involved;

(f) Disclosure of financial information concerning the employee or family members, other than for tax purposes or from those who make tax determinations; and

(g) Submission, in the case of an employee who is under investigation for misconduct, to "interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests."

Also prohibited is taking action against an employee for exercise of rights secured by the bill.

The proposed legislation would make it illegal for the Civil Service Commission to engage in similar conduct. It permits suits to be brought against individual government officers by employees or employee

organizations, to enjoin violations or to "obtain redress against the consequences of" violations. Alternatively, violations may be adjudicated before a newly-created Board of Employees' Rights, which will have power not only to issue cease-and-desist orders but to reprimand, suspend without pay or remove an officer or employee found to have violated the Act. In general, exhaustion of administrative remedies is not required.

II. Discussion

1. "Require or request". We agree that employees should not be required to engage in most of the activities listed in the bill. Furthermore, under some circumstances, a request can amount to a requirement. However, this is a factual question which is routinely decided in cases involving illegal coercion in employment and other relationships under other statutes, such as the unfair labor practices provisions of the National Labor Relations Act.

There does not appear to be sufficient basis in the hearings on this legislation to support an absolute ban on all "requests," especially where, as discussed subsequently, severe sanctions may follow under the bill from what could be an innocent act. We therefore recommend that the terms "request, or to attempt to *** request" be deleted from all of the sections of the bill. The prohibition of requiring the described conduct should be sufficient, especially where to "attempt to require" such conduct is also prohibited by the bill.

2. Comments on individual prohibitions:

(a) Racial census. In regard to the ban on inquiries as to race, religion or national origin, there are exemptions only for qualifications relevant to national security undertakings or foreign assignments, or for an inquiry concerning citizenship where that is a statutory condition of obtaining or retaining employment.

There is much controversy over whether ethnic counting is a proper or desirable means of promoting equal employment opportunity. Under another federal statute, the

Equal Employment Opportunity Commission has required such information from private employers. In the absence of current evidence of abuses in this area, we doubt the need for legislation at this time to prohibit such inquiries of federal employees.

In any event, further qualification seems needed even on the basis of the premise of the bill that questions on these subjects should be discouraged. See the Senate Report, pp. 16-19. While it would be rare, there may be instances other than those listed where one's background could be relevant to a specific assignment or position. We therefore recommend that if the provision is adopted, the exemption be broadened to permit "inquiry concerning any of the aforesaid if specifically relevant to a particular condition of obtaining or retaining employment or to the performance of his duties."

(b) Non-duty meetings. The legislation makes it a violation to "state or intimate, or to attempt to state or intimate" that "any notice will be taken" of attendance at meetings not relevant to performance of official duties. The phrases "intimate" and "attempt to intimate" seem excessively vague, especially where severe sanctions are possible for violations. Likewise, the reference to taking "any notice" seems ambiguous. If it refers solely to attendance or non-attendance being held against the employee, then a simple prohibition against coercion would achieve the same result more clearly. If it refers to the fact that someone may become aware of attendance or non-attendance, then it might cover entirely innocent situations devoid of coercion.

Moreover, whether a given meeting is relevant to one's duties, or to related skills, may well be a matter of opinion. Compare the Senate Report, pp. 20-21. It is therefore particularly important that, if this provision is adopted, the prohibition be limited to coercing attendance.

(c) Community activities. The hearings disclose no recent specific testimony concerning abuses in regard to requesting or requiring employees to engage in outside activities. It appears that requests for federal employees to become active in community affairs were

common in some agencies in the mid-sixties. But no significant problems in this area since that time appear to have been documented.

The need for this provision is not discussed in the Senate Report, although detailed support for the need for action in other areas is set forth. There can obviously be legitimate differences of opinion as to what activities are related to official duties. In our opinion, there has been an insufficient showing of the need for legislation in this area.

The related prohibition dealing with reports on outside activities contains an exception where "there is reason to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties." We recommend that if this provision is adopted, the exception be broadened to embrace unlawful conduct generally, as well as activities in conflict with one's duties. Illegal outside activities are not discussed in the Senate Report. Further, the thrust of the Senate Report, pp. 19-23, is in terms of protection of freedom of opinion. This could be dealt with by a much narrower prohibition of questioning or requiring reports on outside political or religious activities or opinions.

(d) Personal relationships, psychological and polygraph tests. The prohibitions on interrogation and tests concerning one's personal relationships, designed to deal with inquiries into extramarital relationships and the like, may go too far in instances where, for example, an applicant for an investigative position may be related to persons who are or may become the subject of investigation. An exception should be made for such questioning in the case of investigative and other law enforcement personnel (see section 5 of this report, below), and in the case of individuals holding high-level decision-making positions.

The bill goes on to deal with psychological tests in the same manner as questions about personal relationships. We believe a difference may be justified; there is room for doubt whether employees should be ever compelled to take psychological tests at all. In the limited area of personality testing, consideration might thus be given to broadening rather than narrowing the scope of the bill.

The provisions dealing with polygraphs are limited to precluding the request or requirement of their use in connection with the questions concerning personal relationships which are also prohibited when asked directly. Again, we doubt the desirability of compelling employees to take polygraph tests at all, at least absent convincing evidence that such tests are inherently reliable and hence unlikely to lead to unfair adverse findings against employees required to take such tests. Here as elsewhere in the bill, whether a "request" amounts to coercion should depend, we believe, on the circumstances.

(e) Political activities. The provision dealing with requiring or requesting political contributions or work overlaps the Hatch Act and other existing legislation. We believe further legislation on this subject should await the thorough review of the Hatch Act which is expected after the Supreme Court decides the pending challenge to that statute.

(f) Bond drives and charity appeals. Here the bill makes it a violation only "to coerce or attempt to coerce" an employee. We believe that the coercion concept is preferable to the extremely broad and vague language "to request" or "attempt to request" used in other parts of the bill. As suggested earlier, we believe wording such as "to require or attempt to require" should be adopted throughout the bill. If this were done, separate use of "to coerce" would be unnecessary.

(g) Financial disclosures. Related provisions bar calling upon employees to disclose items of "property, income, or other assets, source of income, or liabilities, or *** expenditures." This ban is far too broad in our opinion, and would inhibit legitimate inquiries into corruption or potential conflicts of interest. It may be that the existing Executive Branch program for eliciting financial and investment data from individual employees reaches down to too low a level to justify its intended purpose. Making such inquiries of personnel in policy-making or otherwise sensitive positions, however, seems sound in order to assure against the creation of situations involving a conflict of interest or potential compromise of an employee. The benefits to be derived from eliminating conflicts and the appearance of conflicts in public

servants far outweigh the minor invasions of privacy to be suffered from providing information of this type. This provision should be eliminated or written to permit inquiry, subject to safeguards as to confidentiality of the information, when it is sought to determine propriety of job-related conduct or conflict-of-interest situations.

(h) Counsel during interrogations. The bill requires that one being interrogated for disciplinary purposes be able to have counsel or someone else present at his request. It may be most difficult to determine when questioning can lead to disciplinary action, which is not confined by the section to criminal prosecution or sanctions covered by the civil service laws. To require the supervisor to make such a determination at his peril every time a problem situation arises could interfere with the effective administration of an agency. Even in criminal cases, a "Miranda warning" is only necessary when the person questioned is in custody.

We feel that the problem of when a right to counsel arises is better dealt with on a case-by-case basis and that a broad legislative solution is not workable. Where rights affecting criminal prosecutions are infringed, such violations can be raised in the criminal case, e.g., by seeking exclusion of the resulting evidence. We recommend that this provision be deleted.

If the provision is enacted, we believe it should be made clear that the legislation does not require counsel in routine supervisory interviews, such as those which deal with possible work deficiencies or safety violations of an employee. No office or plant can function if every time a minor policy or regulation is violated and an employee could be disciplined for the breach, the employee is entitled to an attorney.

3. Civil Service Commission coverage. We agree that whatever prohibitions are finally adopted should apply to personnel of the Civil Service Commission as well as of the employing agency. It would seem simpler to include the Commission and its staff in the basic prohibitions, however, rather than to add an entirely separate section dealing with the Civil Service Commission alone and repeating much of the matter already dealt with in the basic portions of the bill.

(Also see section 7 of this report, below, dealing with a role for the Commission in enforcement of this legislation.)

4. Sanctions. The bill provides for civil actions to obtain injunctions and "redress against the consequences" of violations. This would appear to include damages. The bill also expressly provides for class actions, and employee organizations are given standing to sue.

We agree that damages as well as injunctive relief might appropriately be afforded, at least for some serious violations of the law if enacted. We recommend, however, that any such damages be recoverable against the agency involved rather than the individual officer, for these reasons:

(a) Unlike the individual officer, the agency will normally be able to pay any judgment recovered for the benefit of the plaintiff;

(b) Agency liability will induce agencies to establish internal procedures to avoid violations;

(c) Individual liability may lead to excessive caution by individual officers in legitimate activities for fear of possible personal damage suits.*

The proposed legislation is unclear as to the validity of a discharge or other adverse action against an employee which is justified on the merits, but where one of the procedural protections set forth is violated. Nor does it indicate whether damages are recoverable in

* See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 514-16 (1955); compare also Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722 (1947); Committee on Criminal Law, Federal Bar Association of New York, New Jersey and Connecticut, New Approaches to Enforcement of the Fourth Amendment, 3 Criminal L. Bull. 630, 632 (1967); "Measures Relating to Organized Crime", Hearings Before the Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee, 91st Cong., 1st Sess. 226 (1969).

such a case. We believe that in such a case the discharge should stand and no damages should be allowed.

H.R. 856 also creates a Board of Employees' Rights, which would provide an administrative remedy if individual agency grievance mechanisms were inadequate. The administrative remedy, in addition to punitive action against the offending officer by way of reprimand, suspension or removal, which a court action apparently cannot produce, could result in a cease-and-desist order equivalent to the judicial injunction. Nevertheless, the bill provides for immediate access to the courts as an alternative remedy. We believe that an administrative remedy is preferable, and that parallel direct access to the courts is not appropriate (see section 6 of this report, below).

H.R. 856 also provides for court-martial penalties in the instance of violation by military officers. We disapprove this criminal sanction approach as unduly harsh, as we did on a prior occasion.* In addition, we fail to understand the logic of making certain acts, relating to civilian employees of the Government, crimes when performed by military supervisors but not when performed by the much larger body of civilian supervisors.

5. Exemptions. Some versions of this legislation have completely exempted the FBI, CIA and National Security Agency from its provisions. H.R. 856 exempts certain internal personnel questioning activities of those agencies. We think it unsound to make this distinction between those three agencies and other law enforcement and sensitive security agencies; e.g., Secret Service, Postal Inspection Service, certain State Department, Defense Department and Treasury Department sections, the Bureau of Narcotics and Dangerous Drugs and other Justice Department law enforcement divisions, etc.

* Committee on Federal Legislation, Proposed Legislation to Protect Certain Rights of Privacy of Civilian Employees of the Federal Government, 6 Reports of Committees of The Association of the Bar Concerned with Federal Legislation 55 (Nov. 1967).

The legislation is applicable by its terms only to Executive Branch employees. We fail to see why Executive employees are covered but employees of the Legislative Branch are excluded.

Actually, if the legislation is properly drafted to permit job-related questions and requests, the nature of which will differ from agency to agency, as suggested in several places above, absolute agency exemptions or exclusions should not be necessary in our view.

On the other hand, we would favor a clear functional exclusion of law enforcement (as distinct from internal personnel) activities of any agency. Much of the information protected by the legislation is useful and traditionally sought by law enforcement officers in determining whether a crime has been committed and who committed it. It should be set out in the statute that legitimate law enforcement activities and grand juries are exempt from its provisions as related to criminal investigation of conduct by Government employees.

6. Exhaustion of administrative remedies. The provision of the bill that U.S. District Courts shall have jurisdiction to grant the relief outlined therein "without regard to whether the aggrieved party shall have exhausted any administrative remedies that may be provided by law" is something of an anomaly.

H.R. 856, like the version of the bill which passed the Senate last year (S.1438), contains a provision creating a Board of Employees' Rights, which would have authority to investigate written complaints of violation or threatened violation of the Act and to issue determinations and cease-and-desist orders. The bill also specifies that the remedies it creates shall not prevent establishment of department and agency grievance procedures to enforce the Act, and that, if such procedures are established and the employee or applicant has thereby obtained protection against threatened violations or complete redress for violations, the grievance procedure may be pleaded in bar in the District Court or before the Board of Employees' Rights. This provision seems to imply that, if agency grievance procedures were to be established, they would be capable of affording complete and adequate

relief. Thus, the provision properly applies the general principle that available administrative procedures should be pursued to completion before seeking judicial relief.*

On the other hand, absent such grievance procedures, it is not a prerequisite to court action that an employee have pursued any other remedies within his agency, or even the specific remedy before the newly-created Board. Indeed, the bill requires the employee to elect between going to the Board or to court. It may well be that general agency personnel procedures, aimed at processing charges brought by supervisors against lower-ranking employees, are not well suited to handling coercion charges brought against supervisors by other employees under this legislation. But the specific remedy before an independent Board would seem well suited to redressing most of the complaints that might arise under this bill. If the legislation as enacted provides for the Board, exhaustion of its processes before bringing any case to court would seem advisable, not only as a matter of sound administrative law, but to limit the burden this legislation would impose on the federal courts (particularly in districts with large concentrations of federal employees).

To this same end, we believe proceedings in court on employee grievances under this bill should consist of an appellate review of the procedures followed in the handling of the complaint by the agency and the Board, and of the adequacy of the relief granted, rather than a de novo proceeding.

7. Strengthening the Board's role. We believe that strengthening of the Board by providing for full-time membership, adequate staffing and budget, and an appropriate relationship to the role of the Civil Service Commission under the other legislation governing federal employees' status, are all necessary to enable its decisions to have the respect that would minimize resort to the courts by aggrieved employees or agencies.

* See L. Jaffe, Judicial Control of Administrative Action 424 et seq. (1965); 3 Davis, Administrative Law §20.07 (1958).

It is beyond the scope of this report to discuss in detail the interrelationships between the powers this legislation would give the Board to discipline supervisory personnel found to have coerced employees, and the rights of such supervisory personnel, as government employees themselves, in terms of the civil service laws and the authority of the Civil Service Commission. However, as a general matter, this legislation would create considerable opportunity for conflict between the respective roles of the Board and the Commission. We suggest that consideration be given to making the Board a semi-autonomous adjudicative body subordinate to the Civil Service Commission. Analogous relationships exist in the status of the Board of Immigration Appeals vis-a-vis the Attorney General, and that of the Judicial Officer of various other departments vis-a-vis the Secretary. Such a relationship would strengthen the Board's status in promoting enforcement of this legislation, and at the same time retain the Commission's ultimate responsibility for the administration of all the laws regarding federal employees' status and conduct.

III. Conclusion

Since the facts upon which the legislation would be based are in large part now more than half a decade out of date, we believe that further recent information is needed before action is taken. We also believe, as outlined above, that considerable redrafting is still needed to avoid excessive rigidity.

May 11, 1973.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION

MARTIN F. RICHMAN, Chairman

MARK H. ALCOTT
STEPHEN E. BANNER
BORIS S. BEPKOVITCH
DONALD J. COHN
ELIZABETH B. DUBOIS
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WILLIAM B. PENNELL
BRUCE RABE
BENNO C. SCHMIDT, JR.
THOMAS J. SCHWARZ*
BEATRICE SHAINSWIT (Hon.)
BRENDA SOLOFF

* Dissenting in part, on the basis of the individual views annexed.

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U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., July 19, 1974.

HON. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits, Committee
on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. WALDIE: Reference is made to your letter of July 10, 1974 in which you request information on cases which have come before the Board since 1970 involving the dismissal of employees on grounds of suitability and the number of those dismissals which were upheld by the Board.

The suitability appeals that come to the Board involve both employees and applicants. Employees who are found unsuitable are removed; applicants who are unsuitable received an ineligible rating.

Below are two sets of statistics for the past four fiscal years, beginning with July 1, 1970—one for employees and another for applicants.

SUITABILITY DETERMINATIONS INVOLVING EMPLOYEES—ACTION TAKEN BY THE BOARD

| Fiscal year | Affirmed | Reversed | Remand | Canceled | Total |
|-------------|----------|----------|--------|----------|-------|
| 1971..... | 65 | 13 | 2 | 2 | 82 |
| 1972..... | 25 | 12 | | | 37 |
| 1973..... | 24 | 5 | 1 | | 30 |
| 1974..... | 23 | 14 | | | 37 |

SUITABILITY DETERMINATIONS INVOLVING APPLICANTS—ACTION TAKEN BY THE BOARD

| | | | | | |
|-----------|----|---|---|---|----|
| 1971..... | 15 | | 1 | | 16 |
| 1972..... | 19 | | 2 | 1 | 22 |
| 1973..... | 18 | 2 | | | 20 |
| 1974..... | 8 | 8 | 2 | | 18 |

If I can be of any further assistance, please let me know.

Sincerely yours,

WILLIAM P. BERZAK,
Chairman, Appeals Review Board.

COMMENTS ON PROPOSED REVISION OF CIVIL SERVICE COMMISSION SUITABILITY
REGULATIONS, 5 CFR PART 731, BY THE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union of the National Capital Area submits herewith the following comments on proposed revision of the Civil Service Commission Suitability Regulations.

I. THE EXISTING REGULATIONS

The purpose of the proposed revision of the Suitability Regulations, as stated in CSC Bulletin No. 731-2, is to meet the requirement of various court decisions that in order to justify an employee's removal for his conduct, the government must establish a "nexus between the employee's conduct and his ability to satisfactorily perform the duties and responsibilities of his position, or the agency's ability to perform its mission without a deleterious effect on the efficiency of the service in general."

In *Society for Individual Rights v. Hampton*, the United States District Court for the District of Southern California said that such a nexus cannot be established solely on the ground that "employment of such a person might bring the (government) service into . . . public contempt." This is basically the same position first voiced five years ago by the United States Court of Appeals for the District of Columbia in *Norton v. Macy*. Plainly stated, dismissal of a government employee or rejection of a government job applicant must be based on specific job-related criteria.

We believe that this limitation of the criteria to job-related considerations ordered by the courts provides a much-needed protection to government employees against disciplinary action based on arbitrary and irrelevant factors. It is also an important step in protecting employees from humiliating investigations and interrogations into their private affairs.

The Commission's proposed revision consists of the addition of Sec. 731.202—Factors To Be Considered to the existing Sec. 731.201—Reasons for Disqualification. There are also two minor revisions in the existing regulations. We do not believe that the addition of Sec. 371.202 meets the requirement of a job-related nexus. Moreover, the addition would tend to aggravate invasion of government employees' privacy. Factors To Be Considered will be analyzed on pages 14 to 16.

What follows next is our analysis of the existing regulations with recommendations of how they should be changed to meet the requirements of the controlling judicial decisions.

(a) *Dismissal from employment for delinquency or misconduct.*

This provision should be amended by adding "in performance of the employee's official duties. Denial of employment for delinquency or misconduct where the government can document the likelihood that the delinquency or misconduct will prevent satisfactory work performance."

Since the Commission is seeking to comply with court orders to establish a nexus with work performance, it would be useful for it to spell out the grounds which are *not* to be considered in dismissal or rejection of an applicant because they are not job-related. We recommend adding a sentence to this provision: **Factors Not To Be Considered:** Private activities, associates, dress, physical appearance, sexual preferences, arrest records not followed by convictions, and financial affairs (except insofar as disclosure of activities and financial affairs may reasonably be required under conflict of interest statutes.)

(b) *Criminal, infamous, dishonest, immoral or notoriously disgraceful conduct.*

In explaining why it is proposed to keep this provision without change, "even though it is the provision . . . which has received the most stringent treatment by the Courts," the Commission has cited several examples which are either irrelevant or run counter to the courts' decisions.

As to barring homosexuals from employment, presumably because a homosexual preference is "immoral" or "notoriously disgraceful," the Commission cites the following justifications:

The potential for blackmail might jeopardize the security of classified information

It must be noted that the Commission has consistently raised the spectre of blackmail of homosexuals even where the individual is an avowed homosexual and thus immune from blackmail. On the other hand, the Commission does not raise the threat of blackmail in connection with heterosexuals who might be conducting clandestine sexual activities and thus be vulnerable to blackmail, where an avowed homosexual is not.

Moreover, while the U.S. Court of Appeals in *Gayer* found that homosexual activity may be considered in determining security clearance, the material adduced "must not only be relevant, but no more intrusive of the applicant's privacy than is reasonably necessary." The Court then explicitly recognized that a less stringent standard applies to non-sensitive civil service employment, so that there would be even less basis for intrusion into the applicant's or the employee's privacy.

The conduct might be evidence of an unstable personality

After an exhaustive study of the subject, the American Psychiatric Association has concluded that homosexuality "by itself does not necessarily constitute a psychiatric disorder" and "homosexuality per se is one form . . . like other forms of sexual behavior which are not by themselves psychiatric disorders." This official position by the APA is but the latest in a large (and still growing) body of expert opinion, including the American Psychological Association which last year removed homosexuality from its "abnormal psychology" category.

In addition to these organizational findings, the Commission is aware of the testimony of leading psychiatric experts that homosexuality is not an index of instability. Among these experts are: Dr. Wardell B. Pomeroy, co-author of the *Kinsey Report*; Dr. Warren R. Johnson, Professor of Health Education at the University of Maryland; Dr. Evelyn Hooker, Chairman of the Task Force Report on Homosexuality, National Institute of Mental Health; and Dr. George H. Weinberg, writer and clinical psychologist.

An employee who makes offensive overtures on the job, or whose conduct is notorious among his co-workers, might cause reactions from other employees and from the public which interfere with the effective performance of duties and responsibilities

Of course an employee who can be shown to have engaged in offensive conduct on the job may be subject to disciplinary action, since this is an example of the job-performance connection that the court required.

But the Civil Service Commission has never produced a shred of evidence to show that homosexuals are more likely to make offensive overtures to their co-workers than heterosexuals.

In a score of cases in which the government has unsuccessfully sought to dismiss homosexuals—from *Norton v. Macy* in 1969 to *Baker v. Hampton*, decided in January, 1974—not a single instance of offensive behavior on the job was cited by the Government.

The second clause of the above example—"or whose conduct is notorious . . ." seems to us precisely the kind of "unparticularized and unsubstantiated conclusion that possible embarrassment about the employees' homosexual conduct threatens the quality of the government's performance" that was explicitly banned in *Norton v. Macy*.

What is the "notorious conduct" that might cause reactions from other employees and from the public? The Civil Service Commission has already amply demonstrated that it regards as "notorious conduct" the behavior of an avowed homosexual who is active in his private life in promoting the civil rights of homosexuals, and that it does not matter how circumspect his behavior on the job may be or how excellent his work performance is.

In attempting to justify the retention of the word "immoral" as a grounds for disqualification, the Commission hypothesizes a situation where an applicant or employee is "known" to have taken another's life but for "some reason" no prosecution is instituted or completed. This action, the Commission goes on to state "is immoral, at least in the criminal sense of that term, and employment of that individual would be deleterious to the service."

This example seems quite far-fetched, and clearly inappropriate as a guide to formulating suitability disqualifications. But a brief review of past events makes it clear why the Commission had to come up with this particular example:

In 1966, under pressure from government employees' groups and the American Civil Liberties Union, the Civil Service Commission deleted from the Federal Employment Application form the question: "Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority?"

Thus the Commission ostensibly accepted the principle that it is unfair to bar from government employment the thousands of innocent people who have been arrested but have had the charges dismissed or who have been acquitted. In constructing the above example, the Commission appears to be saying: "We do not normally consider criminal charges not followed by conviction, but we need this loophole for exceptional circumstances."

The fact is, however, that the practice of considering arrest records not followed by convictions as an element in suitability continues to this day.

In a deposition in the case of *Menard v. Mitchell*, Beverly E. Ponder, Chief of the Technical Section, Identification Division of the FBI, gave the following testimony:

Question. Do federal agencies, in particular the Civil Service Commission, receive at present all information about arrests, or only arrests with convictions, when they apply to the FBI?

Answer. They receive all the material that appears on the identification records.

Question. And that includes conviction and non-conviction arrests?

Answer. That is correct.

Consideration of arrest records not followed by convictions as a bar to public employment is beginning to come under judicial scrutiny. In *Thompson v. Gallagher*, a case decided in the Fifth Circuit in December, 1973, the court ruled that an other than honorable discharge is not an acceptable ground to bar an individual from public employment. An other than honorable discharge is closely analogous to an arrest record since it may be given without a court-martial or formal hearing of any kind.

Apart from the Civil Service Commission's practices with respect to arrest records, the example given by the Commission underscores the objection to the

word "immoral" as a standard for disqualification for government employment. As used by the Commission in the past, it covers such activities as private sexual activities and preferences, private financial practices, and now—murder. Any such all-purpose word has meanings too multitudinous to have any meaning at all.

We recommend that the suitability standards enumerated in Provision (b) should be eliminated, since the recommended revision of Provision (a) adequately covers this ground.

(c) *Intentional false statement or deception or fraud in examination or appointment.*

No objections.

(d) *Refusal to furnish testimony as required by Section 5.3 of this chapter.*

We assume that Section 5.3 allows the compelling of only work-related testimony, but the language of Section 5.3 is ambiguous, and we recommend that it be amended to make clear that an employee may not be dismissed for refusing to furnish testimony that violates his right to privacy.

(e) *Habitual use of intoxicating beverages to excess; or illegal use of narcotics or dangerous drugs.*

We recommend that this be amended to read: Current, chronic alcoholism which adversely affects job performance; drug abuse which adversely affects job performance. We do not see why any employee who, for example, gets drunk habitually once every fourth Saturday night should be dismissed if his work does not suffer; nor why one who depends on stimulant drugs such as dextedrine should be dismissed unless this habit interferes with the employee's work. And yet both these habits might be grounds for dismissal as the provision now stands.

But as noted earlier, we do not believe the government has the right to investigate such private conduct in the first place. Unless the conduct manifests itself in work performance, it should be of no concern to the government.

(f) *Reasonable doubt as to the loyalty of the person involved to the Government of the United States.*

The Commission concedes that "the courts will require the record to show the specific connection between the disloyal acts of the employee or applicant and the position employed in or applied for." More plainly stated, in the light of court decisions the Commission should not conduct loyalty-security investigations for non-sensitive jobs.

The only law now in effect which denies public employment for political beliefs or associations is 5 U.S.C. Sec. 118(p), which bars from federal employment any individual who:

1. advocates the overthrow of our constitutional form of government in the United States;
2. is knowingly a member of an organization that so advocates; and
3. participates in any strike against the government.

The ACLU believes that this law is unconstitutional, but at least it suggests greater limits than those observed in the far-ranging inquisitions into political beliefs and associations conducted by the Civil Service Commission.

No other law passed by Congress sets any other disqualifications based on political belief or association. The loyalty program for federal employees begun by President Truman in 1947 was repealed by President Eisenhower who replaced it with a security program, as outlined in Executive Order 10450. This security program has been held by the Supreme Court in *Cole v. Young* to be limited to sensitive jobs, that is, those affecting national security.

The Civil Service Commission has ignored the Supreme Court's limitation. For example, Standard Form 85 requires all employees who are going to work in non-sensitive positions to answer the following question:

"8. Organizations with which affiliated (past and present) other than religious or political organizations or which show religious or political affiliations (if none, so state)."

The form of the questions suggests that the political organization exception refers only to organizations connected with political parties. Since no other explanation is given, applicants may be required to list organizations such as the League of Women Voters, American Legion, National Rifle Association, Americans for Democratic Action, John Birch Society, etc. None of these organizations is connected with a political party, but all of them take positions

on legislation. The exception for "political affiliations" is meaningless in protecting the rights of individuals from inquiry into their political beliefs.

These questions, and the suitability program under this provision which permits the Commission to conduct background investigations which involve questioning friends and neighbors about the political views and associations of applicants and employees are an arrogation to the Commission of powers not given to it by Congress and barred by the Supreme Court.

We recommend that the Commission eliminate this provision, or, at the very least, confine itself to its authorized powers and consider only demonstrable disloyalty to the government of an applicant or employee in a position affecting national security.

(g) *Any statutory disqualification which makes the individual unfit for service.*

No objections.

II. PROPOSED REGULATIONS—731.202—FACTORS TO BE CONSIDERED

As noted at the outset, the Commission proposes to add Sec. 731.202—Factors To Be Considered to establish the nexus required by the courts. Only the first Factor does this:

(a) "Whether the individual's conduct would interfere with or prevent effective performance in the position applied for or employed in."

This seems to us a legitimate consideration, but it would be more straightforward and precise to make it a condition of each existing provision, as we have recommended, rather than an independent, and thereby rather vague and open-ended provision.

(b) Whether the individual's conduct would interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

The Commission's accompanying explanatory bulletin makes it inescapably clear that it views Factor (b) as a giant loophole to permit it to continue the same practices that the courts have outlawed. In attachment #3 to Bulletin 731-2, which expands on the proposed revisions, the Commission explains what considerations go into determination of Factor (b). Among them: Would fellow workers be able to work with the individual in a setting of mutual respect and confidence without detriment to the morale and efficiency of fellow workers?

It is possible, even likely, that some of an individual's fellow workers might find their morale impaired by working alongside someone whose private sexual preferences are homosexual, even though his behavior is impeccable and his work exemplary. It is just as likely that the morale of some government employees might be adversely affected by working alongside someone who is black or Asian, or that some employees might have their efficiency impaired if they have a woman supervisor.

It is illegal to apply such a "popularity contest" standard to exclude minority groups or women from government employment. And the courts have been explicit that this criterion may not be employed to provide the required nexus between the individual's conduct and his job performance.

Factor (c), it seems to us, is covered by Factor (a).

Factors (d) through (i) are not useful in establishing a nexus, although it might be helpful to consider them as extenuating circumstances *after* the nexus has been established.

For example, it is perfectly clear that if there is no rational connection between private homosexual behavior per se and work performance, then it does not make the slightest difference as to the circumstances surrounding the conduct; its recency; the age of the individual; the causative social or environmental conditions; or the absence or presence of rehabilitation or efforts toward rehabilitation. As to this last Factor, as evidenced by expert opinion, there is nothing in homosexual behavior which requires rehabilitation.

Similarly, it is clear that if the government does not have the right to inquire into the private beliefs and associations of applicants or employees in non-sensitive jobs to begin with, then such factors as age, recency, circumstances, etc., are irrelevant.

But our objection to these Factors goes beyond their being useless in establishing the required nexus. They also pose a positive danger of legitimating the abuses of investigation and interrogation we have noted earlier, and of permitting ever-widening invasions of government employees' privacy.

To repeat, these factors might be relevant as extenuation, e.g. when consider-

ing the employment of ex-offenders for certain jobs, once the nexus has been established. If there is no nexus, they ought not to be considered at all.

Finally, we would like to make a general comment on the tone of the Commission's memorandum. It seems to us to demonstrate that the Commission's response to the courts' directives is hostile and grudging; that having lost the long legal battle to hire and fire on the basis of irrelevant, non-work related criteria, the Commission is now going to make a last-ditch stand to formulate and administer regulations that will surely violate the spirit, if not the letter of the law.

This attitude can be seen throughout the Commission's material, especially in the series of questions and answers. Two examples:

"When a person is found eligible under the 'nexus' principle for a relatively minor position, what safeguards will be applied before he is permitted to advance later to a position of greater responsibility where his previous conduct may have a material bearing on job performance?"

Presumably such advancement comes as a consequence of satisfactory work performance, but the Commission appears to consider satisfactory work performance an inadequate reason for promotion. It clings to the "option" of denying promotion on the grounds of non-work related considerations.

"From all of the above, can it be concluded that suitability standards have been lowered to make it easier for Communists, drug addicts, perverts and other so-called 'undesirables' to get into government?"

The Commission's bias in lumping together all persons whose loyalty it doubts as "Communists" and in equating homosexuals with "perverts" is a compelling argument for embodying in the regulations the strictest limitations on the Commission's discretion to hire and fire for other than work-performance criteria.

ANALYSIS OF THE SUPREME COURT DECISION IN *ARNETT V. KENNEDY*, BY THE AMERICAN CIVIL LIBERTIES UNION

The decision of the Supreme Court in *Arnett v. Kennedy* contains two separate elements, both of which deprive government employees of important Constitutional rights.

The first of these elements is the First Amendment question. The decision permits the government to fire employees "for such cause as will promote the efficiency of the service." Mr. Kennedy, who was dismissed for criticizing his superior, charged that this language was vague and overbroad, and that government employees would not know what specific conduct was prohibited to them. In particular, this language could be interpreted to cover employees who, like himself, criticized their superiors, or their agencies, or who exposed graft and corruption or mismanagement in their departments, or otherwise exercised their right to free speech under the First Amendment.

The Court's method of dealing with this First Amendment question is to state: "We hold that the language 'such cause as will promote the efficiency of the service' in the Act (the Lloyd-Lafollette Act) excludes constitutionally protected speech and that the statute is therefore not overbroad."

That leaves each government employee to decide for himself, with no guidelines in the law, whether an action to expose wrongdoing is "constitutionally protected speech." The employee must make this decision in the pervasive atmosphere of a government which highly values only those who "don't rock the boat," who are "team players," and who don't embarrass their superiors or their agencies with criticism or exposés.

What is needed instead of the "efficiency of the service" formula is legislation that clearly spells out what speech is prohibited and what speech is encouraged. In its pamphlet, "A Bill of Rights for Government Employees," the ACLU proposes the following guidelines:

"Government employees have the right to free expression on all issues, including those affecting the public welfare and the stated policies of their agencies, subject only to narrow limitations on disclosure of information which: is vital to national security; would violate a confidential relationship involved in the decision-making process; would invade personal privacy; would impair individual civil rights; and would reveal business information submitted to the government in confidence in pursuit of required licenses or patents."

The second element is that of due process. The Court ruled that the government is not required to provide employees fired to "promote the efficiency of the service" with a trial-type hearing before being removed from the payroll.

The Court's opinion shrugs off the economic penalties of being fired without a hearing as follows:

"Since a (government employee) would be reinstated and awarded back pay if he prevails on the merits of his claim, (his) actual injury would consist of a temporary interruption of his income during the interim . . . a public employee may well have independent resources to overcome any temporary hardship and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits."

The ivory tower unrealism of this statement is underscored by the case of A. Ernest Fitzgerald, who was fired for revealing spectacular waste in the Pentagon. The "temporary" interruption of his income lasted almost four years. When he was ultimately vindicated and reinstated with back pay, he was, of course, ineligible for the promotions and raises that would have routinely come his way if he had refrained from exposing Pentagon mismanagement. Mr. Fitzgerald was fortunate enough to be represented by the ACLU. But if, like most employees in his situation, he had had to hire private counsel to plead his cause, his legal fees would have been well over \$100,000. Few public employees have such independent resources.

The notion that a government employee, fired to "promote the efficiency of the service" (which most prospective employers would translate as "troublemaker") is likely to find employment in the private sector is even less realistic.

Of course government employees who are penalized for exercising their First Amendment rights can always comfort themselves that the Court recognizes that they may be eligible for welfare.

The ACLU Government Employees Bill of Rights sets the following standards for due process:

"Government employees have the right to due process in all written and adverse and disciplinary actions *before* the action is taken, including: the right to counsel during the investigatory and all subsequent stages of the action; notice of the charges; the right to confront; the right to rebut; the right to exclusion of all evidence which is the fruit of illegality; and a written decision on the record. They should have the right to a personally chosen—and for persons who meet standards for appointment of counsel in Federal criminal cases—publicly paid defense in cases where deprivation of pay is substantial or where one's job is at stake."

The net effect of the Supreme Court's decision in *Arnett v. Kennedy* is this: If a government employee has the courage to criticize his agency or to expose corruption, mismanagement or other wrong-doing, and guesses wrong about whether his speech is constitutionally protected, he is fired. If he guesses right, and his speech is in fact constitutionally protected, he is fired anyway. He can expect years of being deprived of his income while he battles the government bureaucracy to seek vindication before he can be reinstated with back pay.

This prospect is hardly an inducement to government employees to speak out, and by so doing, to serve the public interest. This silencing of critical voices within the government will undoubtedly lead to more Watergate-type coverups of wrong-doing. And that is the most serious consequence of the Court's decision. For unjust as these deprivations of constitutional rights are to individual government employees, the ultimate victims of the decisions are all Americans who are being deprived of the right to know the workings of the government that is supposed to be their servant.

AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION,
Washington, D.C., September 16, 1974.

HON. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits, Post Office
and Civil Service Committee, U.S. House of Representatives, Washington,
D.C.

DEAR CHAIRMAN WALDIE: We understand that your subcommittee will consider the Right of Privacy Bill (H.R. 1281) on Tuesday, September 17, 1974. In this regard, may we take this opportunity to inform you that the American Society for Public Administration is deeply interested in the objectives of this legislation. At its Annual Conference in Syracuse on May 8, 1974, our organization considered and adopted a position supporting statutory action confirming the rights of individuals seeking and holding careers in the public service to personal privacy and freedom from official coercion.

In accordance with established ASPA procedures for taking positions on public policy questions, our national committee on public issues conducted a thorough analysis of the need for legislation in the area of civilian employee rights, including the review and comment by any of our 84 local ASPA chapters throughout the country that desired to do so, before a final position was adopted at our National Conference.

ASPA's official position is to support the objectives of legislation along the lines of S. 1688 as a measure which will provide a statutory basis for preservation of certain rights and liberties of those persons who have chosen careers with the Federal Government or will do so in the future. We believe that such legislation can serve as a model to state governments where abuses to right of public employees may be less visible than on the national level but are still present. Of nearly equal importance is the fact that such legislation could assist the Federal Government in attracting and retaining the best qualified employees.

The American Society for Public Administration sincerely hopes that legislation consistent with the concepts outlined above will be approved by the Subcommittee on Retirement and Employee Benefits and presented to the full committee. We are enclosing a copy of the official ASPA position paper on the right of privacy which we hope will be of use to the committee in its deliberations. Also included is a summary of that paper.

Thank you very much for considering our views on this important matter. If you require any additional information regarding our opinions on this legislation, please do not hesitate to call on us.

Most respectfully,

SEYMOUR S. BERLIN,
Executive Director.

Enclosure.

POSITION PAPER ON THE RIGHT OF PRIVACY OF GOVERNMENT EMPLOYEES AND PROSPECTIVE EMPLOYEES; PREPARED FOR THE COMMITTEE ON PUBLIC POLICY AFFECTING PUBLIC ADMINISTRATION, AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION, DECEMBER 7, 1973

The "Watergate" scandals have prompted efforts toward more open administration of Executive agencies and, particularly, for wider disclosure and control of campaign financing and expenditures. The American Society for Public Administration's National Council, while sharing these concerns and supporting efforts to curb excessive campaign expenditures which have created an unending need for funding which opens the way for fiscal corruption and undue influencing of public policy by contributors, is also concerned that excessive zeal for openness in all aspects of government may further endanger the rights of governmental officers and employees. Government employees, who constitute a substantial share of our membership, have the same basic legal and constitutional rights as all citizens. By choosing a career in public service, a citizen does not derogate himself to second-class citizenship or waive any rights such as the right of privacy.

It has been alleged that various government agencies have encroached upon legal rights of government employees, particularly with respect to their right to privacy. Further, several committees of the Congress, as well as the American Civil Liberties Union, and other concerned non-governmental groups, have concluded that further statutory and executive actions are necessary to safeguard the privacy rights of citizens generally, and those of government employees in particular. The following paper is premised on the assumption that government employees, like all citizens, have certain rights which may be currently jeopardized by available technology and existing laws and procedures. The focus is on government record-making and -keeping of personal data files rather than on the government investigative techniques by which this information is developed; or the consequences of overt actions by government employees, such as the filing of grievances, public expressions of dissent, or overt "whistle blowing." Among the potentially related matters generally excluded is discussion of "national security" issues, the misuse of government resources to harass individuals or organizations, or the extent of political clearance or "blacklisting" in agency hiring and promotions.

Other topics—such as equal employment opportunity procedures, the disclosure of financial interests, or other private information which is now reported or collected by governmental units about their employees—may be developed in the context of this policy during discussions of the subject. Points for study and potential action by ASPA include these:

What are the general rights of citizens as to privacy, and how do the rights of government employees differ from them?

What is the relationship of the Freedom of Information Act, on the status of government employees, their actions, and the collection and publication or release of information by government agencies concerning them?

How relevant are the concepts of loyalty, efficiency and economy as they apply to individual background, performance, and agency hiring, supervision and oversight of potential or current employees?

RIGHT OF PRIVACY

Griswold v. Connecticut, 381 U.S. 479 (1965), and subsequent cases, have held that all citizens have a right of privacy emanating from specific guarantees enumerated in the First, Third, Fourth, Fifth and Ninth Amendments. However, the Supreme Court has never defined the meaning of this recently discovered right and, as a result, its application has been primarily limited to cases involving similar fact situations to the Griswold case which was a prosecuting for violation of Connecticut's statute prohibiting giving information on birth control or distributing birth control devices. Therefore, while the constitutional right to privacy has received recognition by the Supreme Court, the content of the right is still unclear and unlikely to stand when balanced against written constitutional guarantees. To safeguard privacy in the face of various new threats, Congress and state legislatures are considering many bills to further define and enforce this fragile right. From the standpoint of ASPA, none of these bills is more important than S. 1688, "a bill to protect employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

S. 1688, which was introduced by Senator Ervin and 43 cosponsors on May 2, 1973, had previously been introduced in identical or substantially identical form in the 89th, 90th, 91st and 92nd Congresses and was unanimously approved by the Senate in both the 91st and 92nd Congresses. The House has never acted on the bill although identical measures have been introduced each session in that body. The failure of the Senate Judiciary Committee to thus far report S. 1688 may reflect some of the distrust of government employees resulting in the aftermath of Watergate and a reluctance to curb in any way the public's right to know.

Senator Ervin introduced the bill after investigations by the staff of the Constitutional Rights Subcommittee into numerous individual complaints by federal employees and extensive hearings on federal data banks, government personnel policies, federal questionnaires and right of federal employees generally. See U.S. Congress, Senate, *Federal Data Banks, Computers and the Bill of Rights*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Part I and II, 92nd Congress, 1st sess., 1971 Privacy, and the Rights of Federal Employees. Hearings before the Subcommittee on the Judiciary on S. 3779, 89th Cong., 2d Sess., 1966; Privacy, the Census and Federal Questionnaires. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary on S. 1791, 91st Cong., 1st Sess., 1969. These investigations uncovered numerous cases in which improper use had been made of privacy-invading personality tests, improper and insulting questioning during background investigation and denial of due process guarantees in security clearances. Other complaints involved psychiatric interviews, lie detectors, race questionnaires, agency restrictions on employees attempting to communicate with Members of Congress, illegal pressures to support political parties while restricting political activities generally, use of coercive tactics to "encourage" employees to buy savings bonds or contribute their "fair share" to United Givers Funds, restrictive regulations limiting their ability to write and speak, and requirements to disclose personal information concerning finances, property and creditors of employees and members of their families.

At issue is the need to assure efficient and unbiased administration of government, guaranteeing the right of the public to know and protect themselves from excesses revealed in Watergate and related scandals which, in many instances, conflicts with privacy and related individual constitutional rights of public officials and government employees. We feel that the public interest requires fullest disclosure of activities and financial interests which may cause conflicts of interest at the highest levels of government. But, as we move down the governmental hierarchy, the need for the public to know is diminished and the right of the employee to protect his right to be left alone in his private affairs gains the higher priority. We feel that S. 1688 provides a healthy balance between these

conflicting interests and protects the general interests of the public while allowing only the most necessary interference with the private lives of public employees.

S. 1688 is designed, in the words of the Senate Judiciary Committee Report on its predecessor:

"To prohibit indiscriminate executive branch requirements that employees and, in certain instances, applicants for Government employment disclose their race, religion, or national origin; attend Government-sponsored meetings and lectures or participate in outside activities unrelated to their employment; report on their outside activities or undertakings unrelated to their work; submit to questioning about their religion, personal relationships or sexual attitudes through interviews, psychological tests, or polygraphs; support political candidates or attend political meetings. The bill would make it illegal to coerce an employee to buy bonds or make charitable contributions. It prohibits officials from requiring him to disclose his own personal assets, liabilities, or expenditures, or those of any member of his family unless, in the case of certain specified employees, such items would tend to show a conflict of interest. It would provide a right to have counsel or other person present, if the employee wishes, at an interview which may lead to disciplinary proceedings. It would accord the right to a civil action in a Federal court for violation or threatened violation of the act, and it would establish a Board on Employees' Rights to receive and conduct hearings on complaints of violations to the act and to determine and administer remedies and penalties." S. Rept. 92-554, pp. 1-2.

In recent years courts have been more inclined to abandon early precedent that gave supervisory personnel the broadest discretion in managing their departments on the grounds of protecting governmental efficiency. However, these suits have involved great expense, time and jeopardized the earnings of persons appealing from actions of supervisors allegedly violating their rights.

FREEDOM OF INFORMATION—THE OTHER SIDE OF THE COIN

Although the individual government employee should properly concern himself with those aspects of his privacy which should not be breached by government as an employer, nor inquired into even where the individual has exercised his constitutional rights to freedom of expression or association, there are limits to his privacy which stem from the right of the general public to know about the conduct of the public business.

Sigma Delta Chi, the professional journalism society, made the following observation in its 1968 report on government secrecy:

"The Johnson Administration misused one phase of the Freedom of Information law in an effort to bar reporters from any personnel information about a government employee except job title, salary, and the period of time employed by the federal government. This type of unreasonable restriction on personnel information flowed from a Civil Service Commission instruction, and was used by the Office of Economic Opportunity (OEO) and the Agency for International Development (AID) to refuse information on such things as birth place, names of parents, educational background and prior employment."

Robert Vaughan, who headed the Nader study of the Civil Service Commission, has indicated that reports on the performance of agency personnel and practices deny citizens access to information as to how well government employees are performing their jobs, and a suit seeking release of this information was recently reported as pending.

The claim of the Congress for information from all non-elected employees of the Executive branch would seem to be a strong one, since their jobs are to administer Federal laws and programs under congressional delegations of authority. As Representative Moorhead recently stated before a joint meeting of three Senate committees:

"They have always been and must always be responsible to Congress because they are the creatures of Congress—not the Executive. They are the servants of the people and the people's Representative—not their masters."

Last spring, Representative Jerome Waldie, Chairman of the Subcommittee on Retirement and Employee Benefits of the House Committee on Post Office and Civil Service, stated after two days of hearings on invasions of privacy:

"I am quite concerned that investigative files compiled by government agencies or its employees are subject to gross abuse and contain great potential for the invasion of privacy of millions of Americans."

"All indications are that the Civil Service Commission has no real control over what agencies do with the background information provided them."

The *Federal Times* article reporting these hearings noted the testimony of Prof. Alan F. Westin, as a result of his three-year study conducted for the National Academy of Science. Westin recommended that Congress pass a right-of-access law, allowing government employees and other citizens on whom records are kept, to inspect and challenge the accuracy of such records. He further recommended statutory exclusion of misleading records from federal data banks, such as the noting of arrest records without notation of the subsequent disposition of the charge. Professor Westin specifically suggested that the subcommittee inquire further into the content and use of the following seven major computerized personnel files under development by the Civil Service Commission: the register of eligibles, the annuity file, the Commission's own payroll file, the Executive Inventory (potential and present "supergrades" file), the Federal Automated Career System (FACS) file, and the federal personnel statistical sample (10%) file.

The Civil Service Commission has been aware of the pressures on its investigative and personnel file functions for some time. Senator Sam Ervin has held hearings and sponsored bills on government employee privacy which have passed the Senate in the last four Congresses; but the House of Representatives has never passed a companion measure. During this period, the Commission has submitted lengthy testimony supporting the ideals of protection of employee rights and prevention of unwarranted invasions of their privacy.

The Commission's arguments against the specifics of proposed legislation are made on several grounds: that the number of cases of abuse cited is relatively small; that some of the protections specified are not currently problems; that legislative specification of some protections implies past failings on the part of the government; and that some proposals would interfere with the effective and efficient conduct of the government's business. The expense of informing individuals of their rights with respect to information currently on file, and the postponement of routine current requirements for the filing of financial disclosure statements are two cases in point. On this latter point, the Commission felt that restricting agencies to after-the-fact requests for information on possible occurrences of conflict would destroy the existing ethical conduct program of the Executive branch.

In the case of information gathered on the racial backgrounds of federal employees, this is done visually rather than by questionnaire—but is undertaken in order to implement the Commission's perceived responsibility to further merit system principles in insuring non-discrimination in employment. In this respect, the federal employee may have more privacy than private employees, since employers must provide data on color, race, sex and national origin under the provisions of the Civil Rights Act of 1957, as amended. (Obviously, where eradication of discrimination is involved, there is an immediate problem of measuring progress, especially where the collection of comparative data is forbidden.)

A related issue in terms of the applicability of any new legislation to government employees is the question of who should be exempt in terms of either employee groups or agencies. Typically, armed services personnel and some or all federal security agencies have been exempted from coverage by proposed protective legislation. The use of polygraphs ("lie detectors") has also been implied as appropriate for use in the international-affairs community.

In summary, the Civil Service Commission has taken the position that sweeping changes in the statutory protections available to government employees in terms of right to counsel, grievance procedures and the establishment of an independent appeals board are unwarranted, would place unwarranted restraints on proper management actions, and would render government less economical and efficient than it currently is.

POSITIONS ON PENDING LEGISLATION

It is time for Congress to inform the executive branch of its employees' rights and to attempt to put an end to practices that have forced hundreds of employees to surrender their liberty, their privacy, or their freedom to act or not to act, to reveal or not to reveal information relating to their private acts and thoughts.

The ASPA National Council should support the objectives of S. 1688 as a measure which will provide a statutory basis for preservation of certain rights and liberties of those persons who have chosen careers with the Federal Government

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or will do so in the future. We feel that S. 1688 can serve as a model to state governments where abuses to rights of public employees may be less visible than on the national level but are still present. Of nearly equal importance is the fact that such legislation could assist the Federal Government in attracting and retaining the best qualified employees. It is unfair to ask a person to sacrifice basic civil liberties because he seeks a career in the public service. Repeated attempts to limit freedom of thought and association or to coerce employees to contribute to bonds, charity or to support a particular candidate can only lead to a harvest of bitterness which will reduce employee efficiency and lead to loss of many qualified officials who might otherwise continue in governmental service.

SUMMARY OF ASPA'S POSITION PAPER ON RIGHT OF PRIVACY OF GOVERNMENT
EMPLOYEES AND PROSPECTIVE EMPLOYEES

In his radio address of February 23, President Nixon spoke of "the most basic of all individual rights, the right to privacy." He said further that "a system that fails to respect its citizens' right to privacy, fails to respect the citizens themselves."

The position recommended is to support statutory action confirming the rights of individuals seeking and holding careers in the public service to personal privacy and freedom from official coercion.

S. 1688, now passed by the Senate, is designed: "To prohibit indiscriminate executive branch requirements that employees and, in certain instances, applicants for government employment disclose their race, religion, or national origin; attend Government-sponsored meetings and lectures or participate in outside activities unrelated to their employment; report on their outside activities or undertakings unrelated to their work; submit to questioning about their religion, personal relationships or sexual attitudes through interviews, psychological tests, or polygraphs; support political candidates or attend political meetings. The bill would make it illegal to coerce an employee to buy bonds or make charitable contributions. It prohibits officials from requiring him to disclose his own personal assets, liabilities, or expenditures, or those of any member of his family unless, in the case of certain specified employees, such items would tend to show a conflict of interest. It would provide a right to have counsel or other person present, if the employee wishes, at an interview which may lead to disciplinary proceedings. It would accord the right to a civil action in a Federal court for violation or threatened violation of the act, and it would establish a Board on Employees' Rights to receive and conduct hearings on complaints of violations to the act and to determine and administer remedies and penalties." (S. Report. 92-554.)

ASPA's proposed position is to support the objectives of legislation along the lines of S. 1688 as a measure which will provide a statutory basis for preservation of certain rights and liberties of those persons who have chosen careers with the Federal Government or will do so in the future. We believe that such legislation can serve as a model to state governments where abuses to rights of public employees may be less visible than on the national level but are still present. Of nearly equal importance is the fact that such legislation could assist the Federal Government in attracting and retaining the best qualified employees.

SCOTT WAITERS, JR.,
ATTORNEY AT LAW,
East Point, Ga., May 15, 1973.

Re: Right to Privacy Hearing.

HON. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits of the Committee
on Post Office and Civil Service, 207 Cannon House Office Building, Wash-
ington, D.C.

DEAR MR. WALDIE: I appreciate greatly the gracious reception Mr. Gaines and I received before your Committee. After the hearing, we ascertained something further that I feel is extremely relevant to the question of right to privacy of a federal employee. It related, of course, to disability retirement on a mental basis but probably relates to anything and everything adverse that goes into an employee's file.

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Basically, if a federal employee is required to submit to psychiatric evaluation in connection with proposed disability retirement and is not retired on that basis, the file is kept intact including all the lay testimony and is thus available for use later on in the event they decide to travel the same road again with him.

Thus, if someone were suspected of being mentally ill at the age of 21 (and probably this would be the same situation on one suspected to be subversive or homosexual, or otherwise outside of the accepted norm for federal employees), entries would begin to be made in his personal record reflecting all idiosyncrasies that might point in the direction of the mental illness. A close observation over a twenty-year period of time would probably give him a portfolio that would mark him so badly that he could hardly breathe even if he were never discharged.

In order to prevent the destruction of a career on the basis of one suspicion planted into the minds of his superiors and nurtured through the years, I feel that somewhere along the line adverse material, not sufficient to be the basis for an action, should be physically removed from the man's file.

Respectfully,

SCOTT WALTERS, Jr.

East Point, Ga., April 17, 1973.

Mr. DON TERRY,
406 Cannon Office Building,
Washington, D.C.

DEAR MR. TERRY: With reference to our recent telephone conversations, inclosed is an affidavit dealing with Dr. Sidney Wolfe, an affidavit for committee use, a summation of 21 exhibits, more or less.

I am sending exact package to Mr. A. Ernest Fitzgerald this date.

We do appreciate your interest in good government. You are very thoughtful to consider my case of invasion of privacy on the part of Lockheed Aircraft Corporation.

Most sincerely yours,

ORA E. GAINES.

AFFIDAVIT

April 12, 1973.

FULTON COUNTY—STATE OF GEORGIA

I, Ora E. Gaines, 2876 Kimmeridge Drive, Fulton County, East Point, Georgia hereby dispose and state:

1. This document is the authority for Dr. Sidney Wolfe, a duly licensed physician, 2000 P Street, NW, Washington, D.C. to have access to any file, paper or thing in depositories of the United States Government, any State Government or otherwise. Said Doctor Wolfe may, at his pleasure, for unrestricted use reproduce in part or in whole any file, paper or thing as relates directly or indirectly to me. My Social Security number is 254 26 0013, my Navy Serial number is 268 20 44, my United States Civil Service Retirement number is CSA0643404 and my Veterans Claim number is C-6 480 810. END.

[Signed] ORA E. GAINES.

Subscribed and sworn before me, a person authorized by law to administer oaths, this the 12th day of April, 1973 at the office of Mr. Scott Walters, Jr., Attorney at Law, East Point, Georgia.

NADENE L. WORLEY,

Notary Public, State of Georgia at Large.

HEALTH RESEARCH GROUP,
Washington, D.C.

Subject: Civil Service medical records of Ora Gaines examined by Sidney M. Wolfe, M.D. on July 19, 1973 in Mr. Ruddock's office in the Civil Service Commission in Washington, D.C.

DOCUMENT 1

In a letter from A. Tish, M.D. of the C.S.C. to J. E. Griffith, M.D. Medical Director of Lockheed, dated 4/13/62 and in response to a request for information from Lockheed about Mr. Gaines' case, the following information was given to Lockheed:

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A claim (application for retirement) filed by the Department of the Army on 5/17/60 alleged that "Gaines was suffering from a severe emotional disorder which rendered him incapable of performing his duties."

"He was given a complete psychiatric examination at own request on June 17, 1960 and found totally disabled for the duties of aircraft Repair General Foreman by reason of a schizophrenic reaction, paranoid type . . . and was accordingly retired Oct. 21, 1960".

"Still regarded as not fit to resume his former duties."

"Long history of recurring acute psychotic episodes dating back to 1949—under care of Mental Hygiene Division of V.A. for some time."

The above statement clearly implies that the June 17, 1960 psychiatric examination (by Dr. R. Chalmers) found him to be "totally disabled . . . by reason of a schizophrenic reaction, paranoid type."

The following excerpts from documents in Mr. Gaines' medical file show that the implication of Dr. Tish's letter to Lockheed are misleading, if not false:

DOCUMENT 2

To: Dr. Kirkland.

From: Dr. J. Anderson, 3/9/60.

" . . . pleasant in manner . . . increased psychomotor activity. . . . intellectually superior . . . on the defensive."

"One of his chief defense mechanisms is aggressively taking the initiative and holding it in a conversation."

"He cannot take supervision or criticism without feeling offended. The attitude seems to be that of rebellion of and defiance of authority figures."

"Mr. Gaines would be expected to have trouble trying to coordinate his work with others in something like the "team" concept. His thinking is fast and he is to a degree, compelled to act immediately on his ideas and thoughts."

"There is a moderate increase in psychomotor activity, mild flight of ideas, a mood of elation . . . keen realization of environment."

"He is oriented for time, place, person; he does not exhibit such extreme conduct disorder as to bring him into insoluble conflict with his peers; his conflict with authorities, . . . indicates an emotionally immature need for attention and even acclaim. . . ."

"Diagnosis: Manic Depressive Reaction, hypomanic, manifested by the classical signs of this condition, elation, expansiveness, flight of ideas with loosely organized thought processes, increased psychomotor activity, low threshold of frustration tolerance, irritability, inability to accept criticism and supervision, the monopolizing of conversation, dogmatic expression of opinion, litigiousness, sarcasm and rudeness and an excessive facetiousness."

J. M. ANDERSON, M.D.

DOCUMENT 3

Certificate of Medical Examination 5/16/60 R. P. Lushy.

16. Nervous System.

(B) Hospitalized or Treated for Mental Illness? Yes, San Diego Naval Hospital 1945 for nervous disorder. (Richmond Va) VA Hospital outpatient treatment 1949. Remarks: "Physically Qualified."

DOCUMENT 4

Letter, Charles B. Howell, M.D. (Medical Officer at Depot) Atlanta General Depot, U.S. Army

Certificate, 16 May 1960.

I certify that Ora E. Gaines was given a physical exam on 16 May 1960, at AFGHS . . . and was found to be disqualified to perform the duties of Aircraft Repair General Foreman . . . Mr. Gaines had psychiatric evaluation by Dr. J. M. Anderson, Board Certified Psychiatrist and following diagnosis was tendered by Dr. A.:

"Manic Depressive reaction." (See 5/16/60 Report, Dr. A. further states: "I do not see how Mr. G. could be properly entrusted with a position of critical nature where sound judgment is essential.")

"It is my opinion that the above findings totally and permanently disqualify Mr. G. for further useful and efficient service which requires working closely with others, or any position of responsibility where sound judgment is necessary."

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DOCUMENT 5

"Health Qualification Placement Record", 5/16/60, (full capacity checked on all).

Remarks: "Physically Qualified".

DOCUMENT 6

Application for Retirement.—Signed by Supervisor 5/17/60, "seriously deteriorated past 6 months. 2° emotional instability."

DOCUMENT 7

6/9/60 *Authorization to Report* from Dr. Tish (Re: Agency request to require Gaines to retire).

DOCUMENT 8

From Dr. Tish... *Authorization for Medical Examination.*

"Disability indicated by Medical Evidence."

"Manic Depressive reaction, hypomanic phase."

DOCUMENT 9

Letter 7/8/60 from Rives Chalmers (M.D.—Psychiatrist) to Dr. Tish of C.S.C. (Received 7/13/60). Atlanta Psych. Clinic, 2905 Peachtree Rd. N.E. Georgia 39401. Re: 6/17/60 Consultation with Gaines.

"I saw Mr. Gaines in psychiatric consultation on 6/17/60. I have read the written material you sent me regarding Mr. Gaines past history. This present consultation gives me sufficient information to render a diagnostic impression, but does not give me sufficient information to make a firm statement regarding the present extent of this man's disturbance or the probable outcome of this illness.

"... pleasant, superficially friendly, but covertly critical. . . . not appearing to be acutely disturbed, and maintained a measure of control over his verbal production . . . except with respect to his relationship with employers and his criticism of co-workers . . . impression of controlling a tremendous depth of paranoid hostility . . . built up over a long time."

History of acute psychotic episode in Richmond and he applied for treatment at V.A. Mental Hygiene Clinic in 1949. Dr. C. T. Wilfong: "confused, disoriented and actively seeking help" (statement at time of 1949 admission to V.A. Hospital Clinic).

(Back to narrative from Dr. Chalmers letter). "Clinical picture clearly indicates paranoid thought processes associated with depression. Past history more in keeping with a gradually developing paranoid psychosis in an extremely compulsive individual, rather than the manic depressive psychosis previously diagnosed."

"At the present time I consider this man actively disturbed, but I am not willing to state definitely whether his competence is totally impaired or not, frequently a person of this type is able to pick up and exaggerate fault or defects in organizations of which he is a part and it may be that his present criticisms and complaints have some basis in fact. His behavior in this interview is not such that I consider him unable to control his expressions, and I rather feel that the paranoid personality is finding outlet in these forms of hostile criticism without there being active delusional thinking."

"The diagnostic picture could be much more clearly determined if we could have a full battery of psychologic tests for this man, and I suggest that if you plan to take any final action on his retirement at the present time, you would be wise to obtain a full battery of psychological tests which would give us a better picture of the extent of the present sickness."

"... he is actually hoping to have psychiatric help. . . . Psychotherapy could benefit this man."

DOCUMENT 10

Medical Opinions on Disability Retirement Claim, 7/22/60 (from Dr. Tish).

"Dr. Chalmers report of 6/17/60 is now in. I believe we have enough information in the file now from the superior officer's statement on 2801-A and the previous N.P. report of 3/9/60 from Dr. Anderson to show that this employee is unable to render useful and efficient service as General Foreman Aircraft Repair."

"I have no objection to further psychological tests but I can see no need for them at all."

"After action is taken, Retirement Bureau can reply to his letter of 6/19/60."

DOCUMENT 11

From Dr. J. A. Thurnston to U.S.C.S.C., att. Dr. Eugene (Dir. Prof. Services)—R. Chapin 8/4/60.

"... rated 0 percent on psychoneur., mixed, manifested by migraine headaches."

"Examined in our outpatient Department Mental Hygiene Clinic Psychological testing pointed strongly toward the veteran suffering from a "paranoid schizophrenia". Told he needed hospitalization. He accepted and he signed admission (papers?)."

Diagnosis at hospital "Schizoid reaction, paranoid type, incipient, with strong affective component, provisional diagnosed as psychoneurosis?"

From the preceding evidence, the following conclusions can be drawn:

Efforts to get Mr. Gaines removed from his job by means of declaring him mentally ill and *therefore* unable to do the work began—in terms of psychiatric evaluation—on March 9, 1960. (See Document 2.)

Much of the content of that evaluation by Dr. J. Anderson (Army Psychiatrist) is more a good description of a conscientious government employee whose viewpoint is not shared by his superiors, than it is a psychiatric diagnosis.

The use of statements such as "his conflict with the authorities . . . indicates an emotionally immature need for attention" is indication of the very tenuous basis upon which Dr. Anderson's final diagnosis of Manic Depression Reaction is founded.

Document 4, the May 16, 1960 letter from Charles B. Howell, M.D. of the Atlanta Army Depot, says that Mr. Gaines' "was given a physical exam on 16 May, 1960 . . . and was found to be disqualified to perform the duties of Aircraft . . . Foreman".

What the letter does *not* say is that on the same day the letter was written, Mr. Gaines had a physical exam and was found to be "Physically Qualified" by Army doctors.

As is also seen in the subsequent letter from Dr. Tish to Lockheed (4/13/62—Document 1) an attempt is made in this letter to imply that Mr. Gaines was found to be disqualified on the basis of a given exam. In neither case does the exam alluded to mention disqualifying him. In this case, the reference must be to the 3/9/60 evaluation by Dr. Anderson which has already been commented on above.

On the basis of Dr. Anderson's impressions and Dr. Howell's concurrence, the Army moved quickly to rid itself of this employee who dared to question the policy and procedures which defined his working conditions. By the following day, May 17, 1960, (Document 6) Mr. Gaines' supervisor had signed an application for the retirement of Mr. Gaines.

Although by this time the Army obviously felt it had amassed enough evidence to "retire" Mr. Gaines, some uncertainty must have existed—for on June 9, 1960—3 weeks later—Dr. Tish of the Civil Service Commission signed an "Authorization to Report" (See Documents 7 & 8) and "Authorization for Medical Examination".

This resulted in the evaluation of Mr. Gaines on June 17, 1960 by Dr. Rives Chalmers, an independent non-Army psychiatrist practicing in Atlanta.

In a subsequent summary of his evaluation of Mr. Gaines, sent by Dr. Chalmers to Dr. Tish of the Civil Service Commission (Document 9) on 7/6/60 (Received 7/13/60)—several significant differences from Dr. Anderson's findings appear in the descriptions of Mr. Gaines, the final diagnosis and the recommendations. I shall briefly review them:

Descriptions: "Not appearing to be acutely disturbed . . . pleasant, . . . the paranoid personality is finding outlet in these forms of hostile criticism . . . it may be that his present criticisms and complaints have some basis in fact . . ."

Diagnosis/Recommendation: In contrast to the seemingly "clear-cut" diagnosis of manic depressive psychosis and recommendations that Mr. Gaines could not be "entrusted with a position of critical nature when sound judgment is essential"—opinions of Dr. Anderson—Dr. Chalmers thought the clinical picture to be indicative of "paranoid thought processes associated with depression".

Dr. Chalmers was also much more tentative in his conclusions, stating that:

"I am not willing to state definitely whether his competence is totally impaired, or not . . ." and

"The diagnostic picture could be much more clearly determined if we could have a full battery of psychologic tests for this man, and I suggest that if you plan to take any final action on his retirement at the present time, you would be wise to obtain a full battery of psychological tests which would give us a better picture of the extent of the present sickness."

That the Civil Service Commission was eager to help the Army get rid of Mr. Gaines is clearly seen in Document 10, the Medical Opinion on Disability Retirement Claim, written on July 22, 1960 by Dr. Tish of the Civil Service Commission.

Despite the evaluation by Dr. Chalmers, which indicated the need for extensive psychological testing *before* being able to decide whether Mr. Gaines was able to perform his job, Dr. Tish stated, "I believe we (emphasis added) have enough information in the file *now* . . . to show that this employee is unable to render useful and efficient service. . . . I have no objection to further (there is no evidence of *any* psychological tests as of 7/22/60) psychological tests but I can see no need for them at all."

Having sought the opinion of an independent non-Army psychiatrist—when it did not fit with previous findings by the "company" doctor, little attention was paid to it.

Although Mr. Gaines eventually had psychological tests (see Document 11) the results of these tests are not included in his record (only a scanty summary) and his diagnosis during a subsequent hospitalization was *not* a psychosis—but a neurosis. There is also no record of this hospitalization other than the above diagnosis.

Finally, returning to Document 1, the letter from Dr. Tish to Lockheed of April 13, 1962—we see that Dr. Chalmers' examination of June 17, 1960 is "used" by Dr. Tish as the source of a finding of being totally disabled.

As long as Civil Servants face the threat of being harassed, demoted, transferred, fired or "judged" mentally ill as a consequence of criticising government policy, the government will continue to be a place where the worst rise to the top and the best sink to the bottom.

AFFIDAVIT

GEORGIA, FULTON COUNTY

Personally before the undersigned attesting officer appeared ORA E. GAINES who, being duly sworn, deposes and states on oath as follows:

1. Deponent is a Civil Service Retiree of the United States Government.
2. Deponent's retirement was a Medical Retirement and he shows on information and belief that his retirement was based on material of a sensitive nature related to and growing out of a psychiatric evaluation.
3. Deponent shows that his Medical Records relating to his retirement are held by the United States Civil Service Commission.
4. Deponent shows affirmatively that summaries of his Medical Records have been furnished to Lockheed Aircraft Corporation and the Veterans Administration.
5. Deponent has at no time seen his Medical Records that are in the control of the Civil Service Commission nor the summaries thereof, nor has anyone related their contents to him. This he can not assert either the truth or falsity of them since they were prepared initially for the purpose of retiring him medically under Civil Service.
6. Deponent shows on information and belief that the Medical Records aforementioned contain material of both a scurrilous and a derogatory nature which probably reflects discredit on both he and his family.
7. Deponent shows affirmatively that his Medical Records and the summaries that have heretofore been released from them would be of great value to the Congress of the United States in determining what legislative safeguards would be proper in order to protect the right to privacy of a government employee or retiree both in the public release of medical information and in the inner agency exchange of information.
8. Deponent specifically authorizes and requests the Sub-Committee of the Congress of the United States to examine his Medical Records and the summaries thereof heretofore released for the purpose of being used in connection with in-

vestigation of the question of the right to privacy and for any other congressional investigatory purpose.

9. Deponent fears that in the absence of an immediate seizure order his Medical Records and copies of the summaries released therefrom will be altered to frustrate the investigatory purpose of Congress.

10. Deponent makes this affidavit for the dual purpose of authorizing and requesting the examination of his Medical Records and for the purpose of requesting and seeking their immediate seizure for this purpose.

ORA E. GAINES.

Sworn to and subscribed before me this 13th day of April, 1973.

NADENE L. WORLEY,
Notary Public/Witness.

FILE ON ORA E. GAINES

The attached copies number 1-21 relate to the claim of ORA E. GAINES at the Civil Service Commission in conjunction with Lockheed Aircraft Corporation having invaded his privacy. The Documents are identified as follows:

Exhibit 1, Page Z-343 United States Civil Service Commission's Federal Personnel Manual, Chapter Z-1 (formerly 5CFR 29.12(a) (4) now 5CFR 831.106(4). This regulation supposedly restricts the release of sensitive medical information to an availability for review only by a duly licensed physician designated in writing by the individual.

Exhibit 2, is a letter of September 25, 1961, from Alexander Tish, M.D., Chief, Disability Section, United States Civil Service Commission to ORA E. GAINES relating to the release of medical information.

Exhibit 2A, is a letter dated July 15, 1960, from S. L. Hutchinson, Chief, Acute Intensive Treatment Section, Veterans Administration Hospital, Augusta, Georgia, relating to leave.

Exhibit 3, is a letter dated February 20, 1962, from Lockheed Aircraft Corporation purportedly signed by J. E. Griffith, M.D. requesting medical information.

Exhibit 3A, is authorization form from Lockheed signed by Ora E. Gaines requesting release of medical information to Lockheed's "Medical Department."

Exhibit 4, affidavit of Alexander Tish, Chief, Medical Retirement, Civil Service Commission, dated February 13, 1962, relating to release of medical information.

Exhibit 5, Defendant's objection to Plaintiff's Motion For Call, filed U.S. Court of Claims, May 21, 1962, in Ora E. Gaines case implying that Lockheed Aircraft Corporation has not been furnished information relating to Plaintiff's Disability.

Exhibit 6, letter dated October 22, 1962, from L. V. Meloy, General Counsel, U.S. Civil Service Commission, indicating that Lockheed Aircraft Corporation was furnished the prohibited medical information and seeking to limit its use and distribution.

Exhibit 7, letter of November 8, 1962, by L. V. Meloy, aforementioned apparently contending that Lockheed Aircraft Corporation was not furnished the information apparently forwarded to them October 22nd.

Exhibit 8, letter dated May 10, 1963, from L. V. Meloy to Senator Talmadge restating the supposed position of the Civil Service Commission on medical information.

Exhibit 9, letter dated July 29, 1963, by Isaac Joseph, Chief of Section, Bureau of Retirement and Insurance, United States Civil Service Commission, declining to furnish medical information to Ora E. Gaines.

Exhibit 10, letter from L. V. Meloy, dated October 16, 1963, to Ora E. Gaines again insisting that the information is not available except to a physician.

Exhibit 11, letter of October 29, 1963, to Senator Talmadge from L. V. Meloy admitting that Lockheed Aircraft Corporation was furnished a summary of the restricted information.

Exhibit 12, letter of October 25, 1963, from Congressman Charles Longstreet Weltner, again reiterating the restricted distribution such information can have.

Exhibit 13, letter from Mr. Meloy, Congressman Weltner dated October 24, 1963, which shows that the information available to a physician for the purpose of treating Ora E. Gaines would be identical with the information furnished to Lockheed Aircraft Corporation which obviously was not concerned with treating him.

Exhibit 14, is a letter dated October 31, 1963, from L. V. Meloy to Congressman Weltner pointing out that on the basis of the Griffith letter referred to and the

release by Mr. Gaines, Doctor Alexander Tish furnished the information.

Exhibit 15, is a March 1965, grievance based on a release of medical information pointing out that the doctor did not sign the request and this was not denied in the response from management.

Exhibit 15-A is the grievance of Ora L. Gaines of March, 1965, relating to the Release of Medical Information.

Exhibit 16, is a letter dated March 30, 1965, from T. D. Roberts, Labor Relations Representative to Mr. Padgett relating to a grievance of Ora E. Gaines growing out of the release of Medical Information.

Exhibit 17, and 17A, are requests from Grievance Hearing Minutes and a copy of the Minutes.

Exhibit 18, is a letter of August 7, 1965, suming up the position of Ora E. Gaines on the release of Medical Information.

Exhibit 19, is a letter from L. V. Meloy to Senator Talmadge stating the Civil Service's position.

Exhibit 20 and 20A, is a request for release of 4 November, 1967, for Medical Information to the Chairman of the Board of Veterans Appeals, a nonphysician, and an acknowledgement that the material had been released to them.

Exhibit 21, relates to the death of J. E. Griffith.

Exhibit 22, in response of February 16, 1972, to request to the President for the release of this medical information.

CONCLUSIONS

Obviously, there exist a Civil Service Regulation restricting the release of sensitive medical information. The regulation is enforced to the extent that an employees attorney can not have the information, even in connection with an Appeal of a Medical Retirement based on it. The purpose is to make sure that the information is used only for the purpose of treatment of the employee or former employee. Thus, we protect a man by not allowing any nonmedical person to review a sensitive medical record and possibly tell the individual that something would be injurious to his well being or limit his ability to be treated. The Regulation is such that the information can not even be released to other government agencies.

Applying this in the ORA E. GAINES case, we find that in connection with employment he was requested to sign a routine Medical Authorization for the release of his medical history. GAINES consulted with the doctor and was told to sign it because no sensitive information could possibly be released on that basis since it was authorizing the release to the Medical Department of a Corporation rather than to an individual practicing physician. Thereafter, a request letter was routinely typed up on the Corporate letterhead for signature by the Corporation's doctor. The doctor signed, not personally, but as medical director of the Corporation. He denies the signing and the signature would indicate the probability that his name was affixed by someone else who initiated it. Just as routinely the Civil Service Commission prepared and forwarded to the Medical Department of Lockheed Aircraft Corporation a summary of this sensitive information. They did not write the doctor personally and tell him before they sent the information that it would have a restricted use but they simply bundled it up and forward it down for the obvious purpose of being considered in connection with employment. A precautionary note was included in the cover letter, not for the purpose of restricting the information, since it was obvious that it would be administratively handled by someone in the office who was probably not a doctor but for the purpose of the Civil Service Commission taking the position that their skirts were clean.

Thereafter, the Civil Service Commission denied the release of the information and then admitted it. The information was also handled by non-doctors—specifically ISSAC JOSEPH—in the Civil Service Commission and was furnished to Mr. Stansell of the Veteran's Administration. These two latter items are not of concern except that they show that the Commission handles the information it receives as it sees fit and not in accordance with its regulations.

Basically, the GAINES situation clearly shows that the Civil Service Commission regulations are used only for the purpose of insulating and protecting the Commission and not for the purpose of insulating and protecting the individual. Anyone knows that a request for medical information from a corporation or insurance adjuster or something like that is for a limited purpose and that purpose is not for the purpose of treatment. By simply hanging a doctor's name on the request (which the doctor himself called a forgery) does not

dignify the request. The giving of a medical authorization does not say release sensitive material in violation of your own regulations.

It is the contention of ORA E. GAINES that his case should be fully investigated by Congress for the purpose of finding out what Legislatively can be done to give him redress and what Legislatively can be done to make the Civil Service Commission more responsive and responsible in the way it administers its affairs and those of the government employees.

Respectfully submitted,

ORA E. GAINES.

EXHIBIT 1

(4) Where the nature of the disability is reported to be a mental condition or other condition of such a nature that a prudent physician would hesitate to inform an individual found to be suffering from such a condition of its exact nature and probable outcome, a complete summary of the medical evidence in his case, including copy of the resume of the reported behavior irregularities or manifestations of unsatisfactory service which is ordinarily furnished as background factual evidence to government medical facilities or psychiatrists or other physicians who conduct the official retirement medical examination, shall be made available for review only by a duly licensed physician designated in writing for that purpose by the individual concerned.

EXHIBIT 2

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT AND INSURANCE,
Washington, D.C., September 25, 1961.

Mr. ORA E. GAINES
East Point, Ga.

DEAR MR. GAINES: Reference is made to your letter of September 3, 1961 in which you requested a copy of the letter dated July 15, 1960, signed by S. L. Hutchison, M.D., of the Veterans Administration.

The regulations governing release of information are reported in section 29.12, Title 5, Code of Federal Regulations. Such regulations do not permit the disclosure of information from the retirement files which is deemed confidential and privileged, except as provided therein. Under the regulations, an annuitant (or authorized representative) is not permitted to review either medical evidence or correspondence between the Commission and any other Federal agency which, as in this case, was received in confidence and is privileged. The Commission's position in this regard has been upheld by the Federal Courts.

Therefore your request for medical records cannot be granted.

Very truly yours,

ALEXANDER TISH, M.D., Chief,
Disability Retirement Section, Medical Division.

EXHIBIT 2-A

VETERANS' ADMINISTRATION HOSPITAL,
Augusta, Ga., July 15, 1960.

PERSONNEL OFFICER,
Atlanta General Depot, U.S. Army, Forcst Park, Ga.

DEAR SIR: Please consider this letter as a request for approximately 30 days advanced sick leave for the above named patient in this hospital.

Mr. Gaines will be a patient here for approximately 30 days for treatment of a service-connected disability. If advanced sick leave is not appropriate he desires to be carried on leave without pay.

Very truly yours,

S. L. HUTCHISON, M.D., Chief,
Acute Intensive Treatment Section.

EXHIBIT 3

LOCKHEED AIRCRAFT CORP.,
GEORGIA DIVISION,
Marietta, Ga., February 20, 1962.

CIVIL SERVICE COMMISSION,
Medical Division,
Washington, D.C.

DEAR SIR: Enclosed you will find authorization for release of Medical information from Mr. Ora E. Gaines.

I would appreciate it if you would furnish this office with diagnosis, prognosis, dates of any examination and/or treatments, and any other essential findings you may have on record concerning him.

For your convenience in replying we are enclosing self-addressed envelope.
Thank you for your cooperation,

Very truly yours,

J. E. GRIFFITH, M.D.,
Medical Director.

EXHIBIT 3-A

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I, the undersigned, do hereby authorize Civil Service Commission, Medical Division, Washington, D.C., to furnish any information concerning my medical records, to the Medical Department, Lockheed Aircraft Corporation, Georgia Division, Marietta, Georgia.

ORA E. GAINES.

EXHIBIT 4

IN THE UNITED STATES COURT OF CLAIMS—NO. 147-60

Ora E. Gaines v. the United States

Affidavit

I, Dr. Alexander Tish, Chief, Disability Retirement Section, Medical Division, Bureau of Retirement and Insurance, United States Civil Service Commission, hereby depose and state:

1. I am a Doctor of Medicine having graduated from New York University College of Medicine in 1922. I have been employed in my professional capacity by the United States Civil Service Commission since 1937.

2. I am familiar with the medical reports which are part of the file maintained by the United States Civil Service Commission upon which the decision to award the plaintiff a disability retirement annuity was based.

3. It is my decision as a prudent physician that the medical evidence upon which the Commission's decision toward the annuity was based should not be disclosed to the plaintiff. The authority for this decision is set out in 5 CFR, 29.12(a) (4) which provides that when a medical condition is of such a nature that a prudent physician would hesitate to inform an individual of its exact nature and probable outcome, the medical evidence shall be made available for review only to a duly-licensed physician designated in writing by the individual concerned.

4. However, copies of medical records may be furnished for the use of the court only, as provided in 5 CFR, 29.12(a) (7) when such records are desired by or in behalf of the parties to the suit, on an order of the court or upon issuance of a subpoena duces tecum addressed to the Chairman of the United States Civil Service Commission requesting the same.

DR. ALEXANDER TISH,
Chief, Disability Retirement Section, Medical Division, Bureau of Retirement and Insurance, United States Civil Service Commission.

Subscribed and sworn to before me this 13th day of February 1962.

RUTH S. HICKEY, Notary Public.

My Commission expires July 14, 1964.

EXHIBIT 5

IN THE UNITED STATES COURT OF CLAIMS

Ora E. Gaines, plaintiff, v. The United States, defendant

No. 147-60

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S MOTION FOR CALL

Defendant objects to plaintiff's motion for call upon the Civil Service Commission filed May 11, 1962, for the reason that plaintiff has not shown wherein said documents are relevant to the issues involved in this case.

It appears from his latest motion that plaintiff assumes that certain documents in connection with his disability retirement were forwarded by the Civil Service Commission to Lockheed Aircraft Corporation in Marietta, Georgia. And it also appears that these documents are those which he now seeks. Of course the Rules of this Court do not provide for call upon a non-party private corporation, such as Lockheed, and if the documents sought are, in fact, the medical records pertaining to plaintiff's disability retirement the Court by order dated November 30, 1961 has already ruled on a previous motion to call upon the Civil Service Commission that said documents would not be produced.

In addition, defendant's counsel has been advised by the Civil Service Commission that no medical records pertaining to plaintiff's disability retirement have been forwarded to Lockheed Aircraft Corporation. Finally, the mere fact that plaintiff assumes that certain records have been sent to Lockheed Aircraft Corporation does not make either the alleged transmittal of the records nor the records, themselves, pertinent to the matters now pending before the Court.

For the foregoing reasons, plaintiff's motion for call filed May 11, 1962, should be denied.

WILLIAM H. ORRICK, JR.

Assistant Attorney General, Civil Division.

EXHIBIT 6

U.S. CIVIL SERVICE COMMISSION,
*Washington, D.C., October 22, 1962.*Hon. HERMAN E. TALMADGE,
U.S. Senate.

DEAR SENATOR TALMADGE: This is in response to your inquiry of October 6 on behalf of Ora E. Gaines of East Point, Georgia, concerning the release of medical information.

Our records show that a claim for Mr. Gaines' retirement on disability was filed for him by the Department of the Army, Atlanta General Depot, Forest Park, Georgia, on May 17, 1960. The agency alleged that Mr. Gaines was suffering from a severe emotional disorder which rendered him incapable of performing his duties. He was found totally disabled for the duties of Aircraft Repair General Foreman, and was accordingly retired effective October 21, 1960. He has been on our disability annuity rolls since then.

A review of the retirement file reflects that on January 31, 1962, Mr. Gaines executed an authorization for release of medical records to the Lockheed Aircraft Corporation, Marietta, Georgia. The company was advised that the information which was furnished for professional use only, was to be regarded as privileged and confidential and was not to be disclosed to Mr. Gaines or any other person.

If we can be of further service, please do not hesitate to call on us.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 7

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., November 8, 1962.

Hon. HERMAN E. TALMADGE,
U.S. Senate.

DEAR SENATOR TALMADGE: This is in response to your inquiry of November 5th on behalf of Mr. Ora E. Gaines of East Point, Georgia, concerning the release of medical information. As stated in my letter of October 22nd, Mr. Gaines was found to be totally disabled for the duties of Aircraft Repair General Foreman, and was accordingly retired effective October 21, 1960. On January 31, 1962, Mr. Gaines executed authorization for release of medical records to the Lockheed Aircraft Corporation and that company was furnished a statement of the Commission's medical findings. No medical records pertaining to Mr. Gaines' disability have been forwarded to the Lockheed Aircraft Corporation.

While the Commission by its regulation which appears in 5 CFR 29.12(a)(4), is prohibited from furnishing Mr. Gaines with information concerning the exact nature and probable outcome of his condition, a complete summary of the medical evidence in his case will be available for review by any duly-licensed physician designated in writing for that purpose by Mr. Gaines.

If we can be of further service, please do not hesitate to call on us.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 8

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., May 10, 1963.

Hon. HERMAN E. TALMADGE,
U.S. Senate.

DEAR SENATOR TALMADGE: This is in response to your inquiry of May 6th in behalf of Mr. Ora E. Gaines of East Point, Georgia, concerning the release of medical information from Mr. Gaines' retirement file. As stated in my letters of October 22 and November 8, 1962, Mr. Gaines was found to be totally disabled for the duties of Aircraft Repair General Foreman and was accordingly retired effective October 21, 1960.

Mr. Gaines brought suit in the Court of Claims. That court on July 18, 1962 handed down a decision sustaining the retirement (see *Gaines v. United States*, Court of Claims No. 147-60). On January 18, 1963 the Department of Justice advised the Commission that they were closing the case and, accordingly, the Commission's litigation case was closed.

Mr. Gaines has been advised several times of the Commission's position in this case and in my letter to you on November 8, 1962, I explained that the Commission, acting under the authority of its regulations, has withheld detailed information from Mr. Gaines. In accordance with regulations which appear in 5 CFR 29.12(a)(4), the Commission is prohibited from furnishing Mr. Gaines with information concerning the exact nature and probable outcome of his condition. A complete summary of the medical evidence in his case will be available for review by any duly-licensed physician designated in writing for that purpose by Mr. Gaines.

If we can be of further service, please do not hesitate to call on us.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 9

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT AND INSURANCE,
Washington, D.C., July 29, 1963.

Mr. ORA E. GAINES,
East Point, Ga.

DEAR MR. GAINES: The request in your July 20 letter, with enclosures, has been carefully considered.

Medical evidence in every retirement file is confidential information, and the Commission's regulations will not permit us to furnish the reports you requested. However, if your personal physician desires medical information obtained in connection with your retirement under the Civil Service Retirement Act for his official use, we will be glad to comply with any such request he may forward over his written signature.

If any Federal agency needs information from a retirement file for purposes of settling a claim filed with that agency, an authorized agency official should request the information.

In accordance with the above, your \$5 (cash) received in this Commission on July 23, 1963, is returned with this letter.

Sincerely yours,

ISAAC JOSEPH,
Chief of Section.

EXHIBIT 10

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., October 16, 1963.

Mr. ORA E. GAINES,
East Point, Ga.

DEAR MR. GAINES: Reference is made to your letter of October 12, 1963 and the enclosure of \$5.00.

I am returning herewith the \$5.00. The regulations of the Commission concerning the disclosure of medical information furnished to the Commission remains in full force and effect, and such information can be furnished only to a duly licensed physician.

Sincerely yours,

I. V. MELOY,
General Counsel

EXHIBIT 11

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., October 29, 1963.

Hon. HERMAN E. TALMADGE,
U.S. Senate.

DEAR MR. TALMADGE: Reference is made to your letter of October 21, 1963 on behalf of Mr. Ora E. Gaines of East Point, Georgia, and our previous correspondence on this matter.

It has been explained to Mr. Gaines several times that Commission regulations appearing in 5 CFR 29.12(a) (4) prohibit furnishing him with information concerning the nature and probable outcome of his condition. However, the regulation provides the furnishing of a summary of the medical evidence to a duly-licensed physician designated in writing by the individual concerned. If Mr. Gaines so designates a duly-licensed physician, the Commission will furnish the summary to the physician so designated. The courts have upheld this regulation in *Elmore v. Brucker*, 236 F(2d) 734, cert. denied 352 U.S. 955, and *McCarter v. Fleming*, D.C. D.C. 3412-59, decided February 19, 1961 as well as in Mr. Gaines' prior case, *Gaines v. United States*, Ct.Cl. No. 147-60, decided July 18, 1962.

The information which Mr. Gaines seeks was released in the form of a summary to the Medical Director of Lockheed Aircraft Corporation on April 13, 1962 pursuant to a release executed by Mr. Gaines. The summary stated: "This information given you is to be regarded as privileged and confidential and is for your own professional use and not to be disclosed to Mr. Gaines or any other person." Thus, we believe we have fully complied with our regulations.

If we can be of any further service, please do not hesitate to call on us. Your enclosures are herewith returned.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 12

CONGRESS OF THE UNITED STATES,
Washington, D.C., October 25, 1963.

Mr. ORA E. GAINES,
East Point, Ga.

DEAR MR. GAINES: I have today received the attached letter from Mr. L. V. Meloy of the U.S. Civil Service Commission in response to the inquiry which I directed to him in your behalf.

I believe that Mr. Meloy's letter clarifies your previous questions. The regulations which appear in 5 CFR 29.12(a)(4), about which you have had contention, are necessary for the protection of individuals involved. Under this law, medical reports, confidential in nature, are available only to duly licensed physicians. By this law, you are assured that your records are not open for anyone's perusal.

Mr. Meloy states that you can obtain your records through a licensed physician whom you authorize to request them. Your authorization must be in writing.

If I may be of any further help to you, please let me know.

Sincerely,

CHARLES LONGSTREET WELTNER,
Member of Congress.

EXHIBIT 13

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., October 24, 1963.

Hon. CHARLES LONGSTREET WELTNER,
House of Representatives

DEAR MR. WELTNER: Reference is made to your letter of October 8, addressed to Chairman Macy, on behalf of Mr. Ora E. Gaines of East Point, Georgia. On October 11, I advised you that a complete reply to your letter would be made after Mr. Gaines' file had been reviewed.

Our records show that a claim for Mr. Gaines' retirement on disability was filed for him by the Department of the Army, Atlanta General Depot, Forest Park, Georgia, on May 17, 1960. The agency alleged that Mr. Gaines was suffering from a severe emotional disorder which rendered him incapable of performing his duties. He was found totally disabled for the duties of Aircraft Repair General Foreman and was accordingly retired effective October 21, 1960. He has been on our disability annuity rolls since then.

Mr. Gaines brought suit in the Court of Claims contesting the validity of his disability retirement (*Gaines v. United States*, Ct.Cl. No. 147-60). The court dismissed Mr. Gaines' petition on July 18, 1960 and the Department of Justice advised the Commission on January 18, 1963 that they were closing the case. Accordingly, the Commission's litigation case was closed.

On September 3, 1963, Mr. Gaines again filed suit in the U.S. District Court for the Northern District of Georgia (*Gaines v. United States*, U.S. D.C. Georgia, Atlanta Division, No. 8549). The complaint in this case appears to be a restatement of the previous case. Substantially the same issues are involved.

Mr. Gaines has been advised of the Commission's position in this matter. It has been explained to him several times that regulations which appear in 5 CFR 29.12(a)(4), prohibit furnishing him with information concerning the exact nature and probable outcome of his condition.

A complete summary of the medical evidence in his case will be available for review by any duly licensed physician designated in writing for that purpose by Mr. Gaines.

If we can be of any further service please do not hesitate to call on us. Your enclosures are herewith returned.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 14

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., October 31, 1963.

HON. CHARLES LONGSTREET WELTNER,
House of Representatives.

DEAR MR. WELTNER: Reference is made to your letter of October 29, 1963 on behalf of Ora E. Gaines of East Point, Georgia, and our previous correspondence in this matter.

By letter dated February 23, 1962, the Commission's Medical Division received a request from Dr. J. E. Griffith, Medical Director of the Lockheed-Georgia Corporation, a division of Lockheed Aircraft Corporation, for medical information concerning Mr. Gaines. Enclosed with the letter was a release of medical information executed by Mr. Gaines which authorized the Civil Service Commission's Medical Division to release any medical information to the Medical Department of Lockheed Aircraft Corporation.

Copies of Dr. Griffith's letter and the release are enclosed.

Dr. Griffith was furnished a summary of the medical information from Mr. Gaines' retirement file. The summary written by Dr. Alexander Tish, Chief, Disability Retirement Section of the Commission's Medical Division contained the statement: "This information given you is to be regarded as privileged and confidential and is for your own professional use and not to be disclosed to Mr. Gaines or any other person."

In accordance with 5 CFR 29.12(a)(4), this information has not been furnished to Mr. Gaines. The courts have often upheld this regulation and did so in Mr. Gaines' prior case, *Gaines v. United States*, Ct.Cl. No. J-47-60, decided July 18, 1962. Thus we believe the Commission has fully complied with its regulations.

Sincerely yours,

L. V. MELOY,
General Counsel.

EXHIBIT 15

GRIEVANCE FORM

* * * * *
Action requested by employee.—The Company let me have and retain the original and all copies of medical information as relates to me which it has obtained from the United States Civil Service Commission; and the Company apologize in writing for its part in connection with matters herein. Furthermore, the Company purge its files and records of all similar information, if any, as concerns other employees wherein the information was obtained under like or similar circumstances; and the Company stop getting involved in non-Company connected private affairs of its employees.

Basis of request.—Seemingly, the Company violates the spirit and intent of its agreement with our Union in that the medical information, instant case, obtained from the Civil Service Commission is unlawfully had because the Company is not a duly licensed physicians; and among other things, the medical information has been had by the Company by its forging of the signature of a real duly licensed physician. I certify that at no time, ever, have I knowingly dealt dishonestly or in bad faith with the Company; and, I submit that acts on my part, if any, involving instant matters, was by coercion or by specific direction of the Company, see Employee's Statement and attendant documentation attached hereto and made a part of this grievance.

ORA E. GAINES.

Statement of department.—This cannot be accepted and processed as a formal grievance. The Company cannot associate this request in any way with conditions of employment including rates of pay, wages or hours of employment. The Company would, however, call to your attention that we regard the information requested of a confidential nature—and was received only after you had signed an Authorization for Release of Medical Information on January 31, 1962.

J. H. EAKES.

EXHIBIT 15-A

GRIEVANCE: O. E. GAINES

Employee's statement

In response to help-wanted newspaper advertisement by or on behalf of the Company, I became employed by it on 20 December 1961 after being subjected to and passing in all respects the Company's physical examination at its Medical Department. I was then and have been employed absent medical limitations.

During working hours, 31 January 1962, I was directed to stop work and to report immediately to J. E. Griffith, M.D. of the Company's Medical Department. I did report as directed as a matter of continued employment with the Company. Upon reporting to J. E. Griffith, M.D., he told me that he wanted my VA (Veterans Administration) medical records. I inquired of his request and he told me that the Company wanted to know about my VA compensation and I told him there was no VA compensation, but that I was getting a fraudulent Civil Service retirement because of my exposing gross wrongdoings such as payroll falsification, wilful destruction of government property, misappropriation of government funds—material facilities for personal use, over-staffing of drunks and bums, gross mismanagement, etc., rigged or fixed Civil Service jobs and the like at the Atlanta General Depot, U.S. Army (under the civilian administration of E. J. Keller and crowd) and that before he proceeded further in connection with obtaining medical information he might be wise to check with the local F.B.I. (Federal Bureau of Investigation). At this juncture, J. E. Griffith, M.D., insisted that the Company have my medical records on file with the Civil Service Commission and I was directed to sign "Authorization for Release of Medical Information" dated January 31, 1962. By direction of J. E. Griffith, M.D., I did sign said Release but prior to signing it I told him that the Company could not obtain the records as a matter of law.

Shortly after 31 January 1962 (two weeks approximately) I personally inquired of J. E. Griffith, M.D., whether the Company had been successful in its efforts to obtain the medical information from the Civil Service Commission and he told me that he did not know of any being had, that he had no interest in the matter. At this juncture, J. E. Griffith nor any official of the Company informed me that the Company was going to or already had forged the signature, "J. E. Griffith, M.D." to the end of having the medical information unlawfully.

About May, 1962 I again inquired of J. E. Griffith, M.D. the status of the Company's efforts to have medical information as concerns me from the Civil Service Commission and I was informed by him that "confidential medical information was had by the Company from the Civil Service Commission and that he could not reveal its nature to me because it was not his to dispose, that it belonged to the Company and its stockholders, etc." At this juncture, J. E. Griffith nor any other official of the Company informed me that the Company had forged the signature, "J. E. Griffith, M.D." on its letter of 20 February 1962 directed towards the unlawful obtaining of medical information from the Civil Service Commission, however, J. E. Griffith, M.D., did, at this juncture, inform me that he had no interest in me or the medical information matter, whatsoever.

After May, 1962 J. S. Griffith, M. D. was shown copy (clear photostat) of letter on Lockheed Aircraft Corporation paper dated February 20, 1962 and he stated that he did not sign his name to the original letter nor did he know who did forge it. Attachments are: reproduced copy of letter of 20 February 1962; & Authorization for Release of Medical Information; & letter of 1 November 1964, addressee: Hon. W. A. Pulver; & letter of November 9, 1964 by E. G. Mattison; and "inclosed or attached information" included with the letter of 1 November 1964 letter, addressee: Hon. W. A. Pulver.

ORA E. GAINES.

EXHIBIT 16

LOCKHEED-GEORGIA COMPANY,
LABOR RELATIONS DEPARTMENT,
March 30, 1965.

Case of: O. E. Gaines.

Mr. PADGETT: This is with reference to the above captioned grievance requesting that certain medical information obtained from the United States Civil Service Commission be released to Mr. Gaines after signing an Authorization for Release of Medical Information, dated January 31, 1962.

It is the Company position that this matter be rejected as improper subject matter for the grievance procedure inasmuch as it was untimely filed and not in any way associated with conditions of employment, including rates of pay, wages, or hours of employment.

We regret we will be unable to provide the requested information as it was furnished to us on a confidential basis after you had signed an authorization for release of medical information, dated January 31, 1962.

However we will be happy to discuss this matter on an informal basis, separate and apart from the grievance procedure at your earliest convenience.

T. D. ROBERTS,
Labor Relations Representative.

EXHIBIT 17

Re: Grievance No. E.P. 754: Filed 3/10/65.

East Point, Ga., April 30, 1966.

Mr. J. HAROLD VAUGHAN,
President, Local Lodge #709, I. A. of M.—AFL-CIO, Marietta, Ga.

DEAR BROTHER VAUGHAN: Please send me one true copy of the minutes in the CASE OF: O. E. Gaines, 531 985, Department 19-20, Shift 2; as heard on the Labor Relations Committee on May 25, 1965. Inclosed is a self-addressed envelope for this purpose. With best wishes,

Fraternally yours,

ORA E. GAINES.

EXHIBIT 18

Mr. JOHN W. MACY, Jr.,
Chairman, U.S. Civil Service Commission,
Washington, D.C.

East Point, Ga., August 7, 1965.

DEAR MR. MACY: Inclosed is \$5.00 as payment for cost of reproduction of all documents pertaining to information released by the Commission from my retirement records to non-designated-physicians such as LOCKHEED AIRCRAFT CORPORATION, one "J. E. GRIFFITH, M.D.," or whoever forged the signature of "J. E. GRIFFITH, M.D."

I want copy of IDENTICAL information released in violation of 5 CFR 29.12 (a) (4) and I want your personal letter insuring me that in the future my rights will be respected.

To be of all possible assistance, please refer to letter October 31, 1963, by L. V. MELOY (GC:JWE:dn) which reads, quote: "By letter dated February 23, 1962, the Commission's Medical Division received a request from Dr. J. E. Griffith, Medical Director of the Lockheed-Georgia Corporation, a division of Lockheed Aircraft Corporation, for medical information concerning Mr. Gaines." close quote.

Mr. Macy, the foregoing assertion is untrue. It is a lie.

On or about 23 February, 1962 a bogus letter typed upon Lockheed Aircraft Corporation letterhead paper dated 20 February 1962 was received by the Commission's Medical Division. This bogus letter bears the plainly forged signature of, "J. E. GRIFFITH, M.D."

Had the real Dr. J. E. Griffith made a proper request for information, which he did not, he could not obtain it lawfully because I have never designated him in writing to have information from my retirement records.

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In his October 31 letter, Mr. MELOY continues, quote: "Dr. Griffith was furnished a summary of the medical information from Mr. Gaines' retirement file. The summary written by Dr. Alexander Tish, . . ." close quote.

This is in connection with letter of AUG 3 1965 by J. James McCarthy, Chief, Hatch Act Litigation Section, Office of the General Counsel which is entirely unsatisfactory.

Mr. Macy, please—no more evasion, no more lying by your crowd, no more double-talk. Just send me the information—only identical to that released in violation of regulations and promise that henceforth no more unlawful releases will be made.

Very truly yours,

ORA E. GAINES,
A citizen-veteran.

EXHIBIT 19

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C.

(Attention Mr. Leeman Anderson, Administrative Assistant)

HON. RICHARD B. RUSSELL,
Senate Office Building.

DEAR SENATOR RUSSELL: This is in reference to your inquiry of August 17 concerning Mr. Ora E. Gaines of East Point, Georgia, a retirement annuitant.

Our records show that a claim for Mr. Gaines' retirement on disability was filed for him by the Department of the Army, Atlanta General Depot, Forest Park, Georgia, on May 17, 1960. He was found totally disabled for the duties of Aircraft Repair General Foreman and was accordingly retired effective October 21, 1960. He has been on our disability annuity rolls since that time.

It has been explained to Mr. Gaines several times that the Commission regulations appearing in 5 CFR 831.106(4) formerly 5 CFR 29.12(a)(4) prohibit furnishing him with information concerning the nature and probable outcome of his condition. However, the regulations provide for the furnishing of a summary of the medical evidence to a duly licensed physician designated in writing by the annuitant. If Mr. Gaines so designates a duly licensed physician, the Commission will furnish the summary to that physician. The courts have upheld this regulation in several cases including one involving Mr. Gaines. *Gaines v. United States*, Court of Claims No. 147-60, decided July 18, 1962.

The information which Mr. Gaines seeks was released in the form of a summary to the Medical Director of Lockheed Aircraft Corporation on April 13, 1962 pursuant to a release executed by Mr. Gaines. The summary stated:

"This information given you is to be regarded as privileged and confidential and is for your own professional use and not to be disclosed to Mr. Gaines or any other person."

Thus we believe we have fully complied with our regulations.

If we can be of any further service, please do not hesitate to call on us. Your enclosures are herewith returned.

Sincerely yours,

L. V. MELOY, General Counsel.

EXHIBIT 20

EAST POINT, GA., November 4, 1967.

MR. JOHN W. MACY, JR.,
Chairman, U.S. Civil Service Commission,
Washington, D.C.

DEAR MR. MACY: Please furnish to Mr. James W. Stancil, Chairman, Board of Veterans Appeals, Washington, D.C. one copy of the summary of medical information from my retirement file as written by Alexander Tish, M.D., Chief, Disabled Retirement Section of the Commission's Medical Division (refer to letter of October 31, 1963, written by L. V. Meloy, General Counsel to the Commission, file ref: GC:JWE:dn).

Inasmuch as the initial summary by Dr. Tish has been unlawfully released to Lockheed Aircraft Corporation on April 13, 1962 (refer to letter dated October 19,

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1963, written by L. V. Meloy, file ref: GC:JWE:dn), I can see no logical reason for not giving Mr. Stancil copy, although he may not be a duly licensed physician.

Please notify me when copy of Dr. Tish's summary is sent to Mr. Stancil. For this purpose, enclosed is self-addressed, postpaid envelope.

Yours truly,

ORA E. GAINES.

EXHIBIT 20-A

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT AND INSURANCE,
Washington, D.C., November 24, 1967.

MR. ORA E. GAINES,
East Point, Ga.

DEAR MR. GAINES: This is in reference to your letters of November 4 and November 11 requesting that Mr. James W. Stancil, Chairman, Board of Veterans Appeals, Veterans Administration, Washington, D.C., be furnished a copy of the medical information in your disability retirement file.

On November 20, 1967 copies of all the medical reports in your disability retirement file were sent to Mr. Stancil as requested.

Sincerely yours,

ANDREW E. RUDDOCK, Director.

EXHIBIT 21

EAST POINT, GA., March 29, 1971.

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT, INSURANCE, AND OCCUPATIONAL HEALTH,
Washington, D.C.

GENTLEMEN: With specific reference to letter dated October 31, 1963 by one L. V. MELOY, (then) General Counsel, file GC: JWE:dn you are on notice: Recently, Mr. Ted Roberts, Director of Personnel, Lockheed-Georgia Company told me, among other things, *that the real J. E. GRIFFITH was dead*. That's what he said.

Referenced letter shows J. E. GRIFFITH to have been furnished unauthorized and sensitive so-called medical summary written by one Dr. Alexander Tish, the Commission; as relates to me.

A quick check on my part shows J. E. GRIFFITH, M.D. is dead indeed—and deceased on or about 3 April 1969 and was buried about 5 April following.

My concern is a question: Who is in control of the "summary" that was corruptly and unlawfully afforded J. E. GRIFFITH prior or after his death? Where is the "summary" today?

Very truly yours,

ORA E. GAINES.

EXHIBIT 22

U.S. CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT, INSURANCE, AND OCCUPATIONAL HEALTH,
Washington, D.C., February 16, 1972.

MR. ORA E. GAINES,
East Point, Ga.

DEAR MR. GAINES: On behalf of the President, this will acknowledge your letter of January 25, 1972.

On April 13, 1962, we did release medical information to Dr. J. E. Griffith, Medical Director, Lockheed Aircraft Corporation. Dr. Griffith's request for this information was accompanied by an authorization for release of medical information which you had signed.

As we have previously advised you, in accordance with civil service regulations, medical information in an individual's retirement file may be furnished only to a licensed physician designated in writing by the individual. This information cannot be released to you.

Further correspondence on this subject can serve no useful purpose.

Sincerely yours,

ANDREW E. RUDDOCK, Director.

DEPARTMENT OF JUSTICE,
Washington, D.C., September 17, 1974.

Hon. JEROME R. WALDIE,
Chairman, Subcommittee on Retirement and Employee Benefits, Committee on
Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reference to your letter of April 25, 1974, to the Attorney General and in acknowledgment of the September 12, 1974, inquiry by Bruce Gwinn, a Staff Assistant with your Subcommittee relating to the testimony before your Subcommittee by Mr. A. Ernest Fitzgerald, wherein certain allegations were made concerning the behavior of Brigadier General Joseph Cappucci while he was Director of Special Investigations, United States Air Force.

As indicated by our letter of June 5, 1974, the Department referred this matter to the General Counsel, Department of Defense for a direct response to your inquiry as to the propriety of that job assignment, because we have no knowledge of the circumstances or basis for General Cappucci's assignment to head the Defense Investigative Service.

We are advised that the Defense Department's letter of June 4, 1974, responded in detail to your inquiries concerning the circumstances and authority for the institution of an agency investigation into allegations of a purported conflict of interests on the part of Mr. Fitzgerald, which were proven to be unsupported. We are also advised that Brigadier General Cappucci retired last month at the same rank as that which he held at the time of Mr. Fitzgerald's removal from the Air Force in 1969.

By our letter of June 5, 1974, we also informed you that our review of the entire record in the Fitzgerald matter has failed to provide the Criminal Division with a prosecutable case against any of the persons responsible for Mr. Fitzgerald's separation from the Air Force in 1969.

Pursuant to the recent inquiry from Mr. Gwinn and in further reference to your April 25, 1974, inquiry, we have again reviewed those portions of the Civil Service Commission hearings record pertaining to the conduct of the Air Force investigative agency formerly headed by Brigadier General Cappucci. As summarized by the Civil Service Commission Appeals Examiner at page 13 of his findings, the file maintained by the Office of Special Investigations was opened on May 17, 1969, "based on conflict of interest charges made against Mr. Fitzgerald by a confidential informant. Subsequently, three (3) more people volunteered information in June and July (Tr. 48-49). A number of checks were made (Tr. 61-62) to test the substance of the allegations. These were in Washington, D.C., in New York, (Tr. 64), Boston (Tr. 70) and in Los Angeles to interview Leonard Marks (Tr. 83-85). All checks came back favorable (Tr. 111, 119) but his favorable information was not placed in the file (Tr. 111)." The Examiner also noted that in addition to not retaining the favorable information "which proved that these allegations were without substance . . . it was unconscionable for Office of Special Investigations [in furnishing its file to "The Hill" (Tr. 157-162)] to have furnished that file without the "June 24, 1969, memorandum report of interview with Leonard Marks . . . which laid the allegations to rest."

The focus of this Department's initial review of the record compiled by the Civil Service Commission in the Fitzgerald matter was to determine whether any possible violations of Federal law had occurred and, specifically, whether the evidence or record indicated that Mr. Fitzgerald had been removed "on account of" his Congressional testimony in violation of 18 U.S.C. § 1505. We determined that there is insufficient evidence of a violation of 18 U.S.C. § 1505 to warrant further action by the Department. In addition, the record indicated that: (1) the Office of Special Investigation file contained allegations of a conflict of interests and did not relate to Mr. Fitzgerald's Congressional testimony; (2) the Air Force officials, Seamans and Schedler, responsible for the decision to remove Mr. Fitzgerald, were unaware of the existence of the Office of Special Investigations file until two weeks after the removal decision was made (Tr. 198, also see Tr. 154-155); and (3) the Air Force explanation of the omission of the memorandum of the interview of Leonard Marks as "evidently due to administrative oversight in the transmission process" cannot be contradicted in view of the death of Vincent Sullivan, Chief of the Background Investigation Center, Office of Special Investigations, who maintained the file and was responsible for compiling the file for the Secretary and for "The Hill" (Tr. 35, 158 & 168). Accordingly, no further action in this regard appeared to be warranted.

Finally, in response to Mr. Gwinn's inquiry and in further response to your letter of April 25, 1974, we are unaware of any Federal criminal statutes governing or precluding the institution of agency investigations based on allegations of employee misconduct. Nor are we aware of any Federal law violated by an investigative agency's decision to retain or dispose of any part of such investigative files at the conclusion of the investigation or after the employee departs from Federal service.

Sincerely,

HENRY E. PETERSEN,
Assistant Attorney General, Criminal Division.

PROPOSAL FOR THE AMENDMENT OF S. 1688

THE NEED FOR ACCESS TO INVESTIGATIVE RECORDS

The question of need for access to investigative files arises basically for one reason, a desire for accurate and relevant information.

First of all, every applicant or employee is subject to investigation, the minimum being the NACL. If any inconsistencies in national security or suitability requirements arise, the individual becomes subject to a full field, more substantial investigation. This is undertaken to determine his or her desirability for Federal employment.

Section 8(c) of Executive Order 10450 states the authority to keep the information compiled from these investigations in confidence. "... reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto ..."

Investigative material is compiled in an indiscriminate basis whether it be true or false, material, immaterial or of any other disposition. In fact, in section 5-1, subchapter 1 of Chapter 731, Federal Personnel Manual, one of the primary reasons for keeping suitability investigative information confidential is "... to protect government personnel against dissemination of unfounded or disproved allegations."

General Joseph Cappucci has testified as well that his investigators do not act as "censors." As a result, the policy of DOD is to collect all information. They do not make a selective decision as to what material goes into a file. This indicates that by policy, all information collected, some which by its very nature may be unsubstantiated, erroneous or immaterial, is included into an investigative file.

Transfer and dissemination of this information in a file is established policy as well. Any agency conducting security programs may receive information from the agency that originally conducted an investigation. It is possible that this information may be spread throughout the entire executive branch.

Because of these facts, access must be granted in order for the subject of the file to examine his or her record to establish the validity of the contents.

Access must be granted in view of the fact that the purpose of a file is to provide proper officials with information by which they can make accurate, but nonetheless, judgmental decisions as to the fitness of an individual for Federal employment. This can only be done by allowing the subject an opportunity to examine the information in a file and provide a mechanism whereby any invalid information not relating to the pertinent question of fitness and qualification may be excised and erased from any and all records.

AN AMENDMENT TO S. 1688

The first paragraph of the amendment is designed, as such, to include all executive agencies that establish and maintain record banks "concerning any person." The direction of this subsection is to certify the concern of the authors that all records must have safeguards and that no agency that maintains records in a systematic manner should be exempt from those safeguards.

(a) (1) This section is designed to restrain each agency from engaging in a wholesale proliferation of information contained in its records by giving it to other agencies and persons who may have a need for this information. The sec-

tion requires that notification be made to the subject of the record that his/her file is being divulged. Upon this basis of notification, the record can be disclosed to those who may need access. It must be noted that this section in no way limits the ability of the agencies to disseminate information they possess. Regardless, this process of notification is a progressive proposal because at present there are no such notification requirements in effect.

(a) (2) This section does essentially the same thing as does the previous section, only this applies to disclosure of record information to persons within the agency itself. Under this proposal, disclosure to those who are in need of the information is based on the requirement that the agency notify the subject of the fact of disclosure. One problem that exists in the wording of both (a) (1) and (2) is that it is not specifically spelled out as to whether disclosure can come before, after or during notification of the individual concerned.

(a) (3) The purpose of this section is to provide some accurate record that will list who has been given access to an individual's record. This record is to include an index which will reveal the names and addresses of all who had access to each individual file. This section also requires that procedures be established which will allow for access by the individual to this accounting record upon request. This record will show each individual exactly to whom his/her record was disclosed to.

(a) (4) Access is granted to the individual in order that this person may inspect his or her own file to examine what it contains. This section also allows that copies be made of these records. This is the access to records section that is the very key to this entire amendment. The section itself though, only provides for access and rights to copy. It does not allow for methods of correction.

(a) (5) A person is allowed to supplement information contained in his or her record through the submission of written documents that further explain some record information. This section does not allow the individual to remove anything from the file, it only allows for an opportunity to provide further clarification through exculpatory or rectifying data.

(a) (6) This section is the second most important of the amendment. It provides that upon a determination by a court or any other administrative body that information within a file is erroneous, immaterial or otherwise unnecessary, that information shall be removed by the agency in custody of the record. This section also states that the agency must notify all other agencies and persons that have received this erroneous information and the agency must insure that this information is removed from the possession of those agencies or persons. The section does not allow the individual who is the subject of this information to remove this erroneous information; that can only be done upon the determination of a court or other administrative body.

The second paragraph, (b), states which records are exempt from the requirements of the amendments: Those that require secrecy, through Executive Order, in the interest of foreign policy; and investigatory files compiled for law enforcement purposes.

The third and fourth paragraphs, (c) and (d), are related in that (d) provides exemptions from the amendment when the disclosure of information or access will compromise the identities of any source of information. (c) provides that the President must perform an oversight function by reporting to Congress, on an agency by agency basis, how many exemptions were granted on the basis of (d). This is essentially the only major oversight function found within the amendment. There are no such enforcement provisions, but a capacity for oversight is important to insure continued compliance with the laws. Unfortunately there is little effective oversight being conducted today on matters such as record maintenance.

Paragraph (e) establishes the requirement that each agency must publish rules regarding procedures to be followed with respect to making records promptly available to an individual. This is the section that lays down to the agencies their responsibilities for providing the public with the information that they are entitled to under this amendment.

AMENDMENT

§ 7174. Individual records

"(a) Each agency that maintains records concerning any person which may be retrieved by reference to, or are indexed under such person's name, or some other

similar, identifying number or symbol, and which contain any information obtained from any source shall, with respect to such records—

“(1) refrain from disclosing the record or any information contained therein to any other agency or to any person not employed by the agency maintaining such record who need to examine such record or information for the execution of their jobs, except—

“(A) with notification of the person concerned or, in the event such person, if an individual, cannot be located or communicated with after reasonable effort, with notification of members of the individual's immediate family or guardian, or, only in the event that such individual, members of the individual's immediate family, and guardian cannot be located or communicated with after reasonable effort, upon good cause for such disclosure, or

“(B) that if disclosure of such record is required by any other provision of law, the person concerned shall be notified by mail at his last known address of any such required disclosure;

“(2) refrain from disclosing the record or any information contained therein to individuals within that agency other than those individuals who need to examine such record or information for the execution of their jobs;

“(3) maintain an accurate record of the names and addresses of all persons to whom any information contained in each individual record is divulged and the purposes for which such divulgence was made, and provide for procedures whereby each individual about whom this information is concerned can obtain access to this record upon request;

“(4) permit any person to inspect his own record and have copies thereof made at his expense, which in no event shall be greater than the cost to the agency of making such copies;

“(5) permit any person to supplement the information contained in his record by the addition of any document or writing of reasonable length containing information such person deems pertinent to his record; and

“(6) remove, upon a determination by a court of law, the Board of Employees Rights (which is established by § 7175 of this bill), the concerned agency itself, or any other administrative body, immediately, any erroneous, immaterial, irrelevant or unsubstantiated information of any kind, and notify all agencies and persons to whom the erroneous material has been previously transferred of its removal and to insure that this erroneous, immaterial, irrelevant or unsubstantiated information is removed from the possession of the agencies and persons to whom it has been transferred.

“(b) This section shall not apply to records that are—

“(1) specifically required by Executive order to be kept secret in the interest of the national defense and foreign policy; and

“(2) investigatory files compiled for law enforcement purposes, except to the extent that such records have been maintained for a longer period than reasonably necessary to commence prosecution or other action or to the extent available by law to a party other than an agency.

“(c) The President shall report to Congress before January 30 of each year on an agency-by-agency basis the number of records and the number of investigatory files which were exempted from the application of this section by reason of clauses (1) and (2) of subsection (d) during the immediately preceding calendar year.

“(d) This section shall not be held or considered to permit the disclosure of the identity of any person who has furnished information contained in any record subject to this section.

“(e) Each agency that maintains records subject to the provisions of this section shall publish rules establishing reasonable times, places, fees to the extent authorized, and procedures to be followed with respect to making records promptly available to an individual and otherwise to implement the provisions of this section.

“(f) Any employee of the United States who under the color of agency authority knowingly and willfully violates a provision of this section, or permits such a violation, shall be fined \$1,000.

“(g) Nothing in this section shall be construed to permit transfer or similar distribution of any information deemed confidential by other statutes.”.

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(2) By substituting for Section 103 the following:
Sec. 103. Annually the Committee, after consultation with the Citizens' Advisory Council, shall transmit a report to the President concerning the status of women.

(3) By substituting for Section 201 the following:
Sec. 201. There is hereby established the Citizens' Advisory Council on the Status of Women (hereinafter referred to as the "Council"), which shall be composed of 20 members appointed by the President, one of whom he shall designate to serve as Chairman. The Council shall meet at the call of the Chairman of the Committee, but not less than twice a year. Members of the Council shall serve without compensation from the United States.

THE WHITE HOUSE,
May 6, 1965.

LYNDON B. JOHNSON

No. 11222

May 11, 1965, 30 F.R. 6469

PREScribing STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code,⁶ and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

Section 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting

6. 3 U.S.C.A. § 301.

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acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the Government.

Sec. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

Sec. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

Sec. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

Sec. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

PART III—STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

Section 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.

Sec. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

Sec. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

Sec. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

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Sec. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

Sec. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

Section 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

Sec. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

Sec. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the

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person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

Sec. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

Sec. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

Sec. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER
SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES
CODE RELATING TO CONFLICTS OF INTEREST

Section 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

Sec. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code, to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

Sec. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

Sec. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

Sec. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

- (a) The head of any department or agency in the Executive Branch;
- (b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and
- (c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

EXECUTIVE ORDERS

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

Section 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) as relates to establishing regulations for the conduct of persons in the civil service.

Sec. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

Section 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

Sec. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

Sec. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.⁷

(b) Executive Order No. 11125 of October 29, 1963.⁸

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.⁹

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

Sec. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters, shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

Sec. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

LYNDON B. JOHNSON

THE WHITE HOUSE,
May 8, 1965.

7. 5 U.S.C.A. note preceding § 2201.
8. 18 U.S.C.A. § 205 note.

9. 3 U.S.C.A. § 301 note.